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STATE

Littler on

Virginia Employment Law

COVERAGE

Scope of Discussion. This publication is designed to help employers operating in a state to identify and apply various state employment law requirements. It follows the chronology of employment—tracking requirements from pre-hire, time of hire, during employment, and the end of employment. Because employers are subject to both federal and state employment laws, each section provides a brief overview of federal law and then summarizes applicable state law.

Although the major developments in Virginia employment law are generally covered, this publication is not all-inclusive and the current status of any decision or principle of law should be verified by counsel. In addition:

- This publication focuses on requirements for private-sector employers; requirements applicable solely to public employers are not covered. Similarly, while some provisions applicable to government contractors may be covered, this publication is not designed to address requirements applicable only to government contractors.
- Local ordinances are generally excluded from this publication. Notwithstanding, local rules may be included to the extent they deal with ban-the-box or criminal history restrictions, local minimum wage, paid sick leave, or antidiscrimination provisions. A detailed discussion of these requirements, however, is outside the scope of this publication. Further, the focus of local ordinances is primarily on jurisdictions with populations of 100,000 or more residents, but laws in locations with populations below that threshold may also be included.
- State law may create special rules or provide exceptions to existing rules for certain industries—for example, the health care industry. This publication does not offer an exhaustive look at these industry-specific exceptions and should not be interpreted to cover all industry-specific requirements.
- Civil and criminal penalties for failure to follow any particular state employment law requirement may be covered to the extent the penalty is specifically included and discussed in the statute. Any penalty discussion that is included, however, is nonexhaustive and may only highlight some of the possible penalties under the statute. In many instances, an individual statute will not include its own penalty provision; rather, a general or catchall penalty provision will apply, and these are not covered here.

To adhere to publication deadlines, developments, and decisions subsequent to **October 11, 2024** are not covered.

DISCLAIMER

This publication is not intended to, and does not, provide legal advice or a legal opinion. It does not establish an attorney-client relationship between Littler Mendelson, P.C. and the user. It also is not a do-it-yourself guide to resolving employment issues or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation may find the information useful in understanding the issues raised and their legal context. This publication is not a substitute for experienced legal counsel and does not provide legal advice regarding any particular situation or employer, or attempt to address the numerous factual issues that arise in any employment-related dispute.

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1.1 Classifying Workers: Employees v. Independent Contractors

1.1(a) *Federal Guidelines on Classifying Workers*

A person providing services to another for payment generally can be classified either as an employee or an independent contractor. An independent contractor is considered self-employed, whereas an employee, as the term suggests, works for an employer. The choice between classifying a worker as an independent contractor or an employee is more than a question of terminology and can have many and far-reaching consequences for a company. A company's legal obligation to its workers under various employment and labor laws depends primarily on whether workers are employees. For example, a company using an independent contractor is not required to:

- withhold income taxes from payments for service;
- pay minimum wages mandated by state or federal law;
- provide workers' compensation coverage or unemployment insurance;
- provide protections for various leaves of absences required by law; or
- provide a wide range of employee benefits, such as paid time off or a 401(k) retirement plan, that are offered voluntarily to the employer's employees as part of the terms or conditions of their employment.

As independent contractor use increased, government officials began to scrutinize asserted independent contractor relationships with increasing skepticism. Courts have also proven willing to overturn alleged independent contractor relationships that fail to satisfy the increasingly rigorous standards applied by federal and state agencies for classifying workers as independent contractors.

For companies, misclassification of a worker as an independent contractor can carry significant tax, wage, and benefit liabilities, as well as unanticipated and perhaps under-insured tort liability to third parties for injuries caused by the worker.

There are four principal tests used to determine whether a worker is an employee or an independent contractor:

1. the common-law rules or common-law control test;[1]
2. the economic realities test (with several variations);[2]

[1] The common-law rules or common-law control test, informed in part by the Internal Revenue Service's 20 factors, focus on whether the engaging entity has the right to control the means by which the worker performs their services as well as the end results. *See generally* Treas. Reg. § 31.3121(d)-(1)(c); I.R.S., Internal Revenue Manual, *Technical Guidelines for Employment Tax Issues*, 4.23.5.4, *et seq*. (Nov. 22, 2017), *available at* https://www.irs.gov/irm/part4/irm_04-023-005r.html#d0e183.

[2] In addition to an evaluation of the right to control how the work is to be performed, the economic realities test also requires an examination of the underlying "economic realities" of the work relationship—namely, do the workers "depend upon someone else's business for the opportunity to render service or are [they] in business for themselves." *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988); *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

3. the hybrid test, combining the common law and economic realities test;[3] and
4. the ABC test (or variations of this test).[4]

For a detailed evaluation of the tests and how they apply to the various federal laws, see **LITTLER ON CLASSIFYING WORKERS**.

1.1(b) *State Guidelines on Classifying Workers*

In Virginia, as elsewhere, an individual who provides services to another for payment generally is considered either an independent contractor or an employee. For the most part, the distinction between an independent contractor and an employee is dependent on the applicable state law (see Table 1).

Under state law, an employer cannot require or request that an individual enter into an agreement or sign a document that results in the misclassification of the individual as an independent contractor, or otherwise does not accurately reflect the relationship with the employer. Further, it is unlawful for an employer or any other party to discriminate in any manner or take adverse action against any person in retaliation for exercising rights protected under the amendments. An employer, or any officer or agent of the employer, that fails to properly classify an individual as an employee and fails to pay taxes, benefits, or other contributions required to be paid with respect to an employee will be subject to a civil penalty. Additionally, an individual may bring a civil action for damages alleging that they have not been properly classified as an employee.[5]

To reduce instances of misclassification of employees as independent contractors, the Virginia Employment Commission has entered into a partnership with the U.S. Department of Labor, Wage and Hour Division to work cooperatively through information sharing, joint enforcement efforts, and coordinated outreach and education efforts.[6]

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[3] Under the hybrid test, a court evaluates the entity's right to control the individual's work process, but also looks at additional factors related to the worker's economic situation—such as how the work relationship may be terminated, whether the worker receives yearly leave or accrues retirement benefits, and whether the entity pays social security taxes on the worker's behalf. *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994). Because the hybrid test focuses on traditional agency notions of control, as a general rule, it results in a narrower definition of employee than under a pure economic realities test. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 347 (5th Cir. 2008).

[4] Under a typical formulation of the ABC test, a worker is an independent contractor if: (A) there is an ABSENCE of control; (B) the BUSINESS is performed outside the usual course of business or performed away from the place of business; and (C) the work is CUSTOMARILY performed by independent contractors.

[5] VA. CODE ANN. §§ 58.1-1900 *et seq*., 40.1-28.7:7.

[6] U.S. Dep't of Labor, Wage & Hour Div. & Virginia Emp't Comm'n, *Partnership Agreement* (June 16, 2016), *available at* https://www.dol.gov/whd/workers/MOU/va.pdf. More information about the U.S. Department of Labor Misclassification Initiative is available on the Wage and Hour Division website, *Misclassification of Employees as Independent Contractors*, at https://www.dol.gov/whd/workers/misclassification/.

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Fair Employment Practices Laws	Office of the Attorney General, Division of Human Rights	There are no relevant statutory definitions or cases identifying a test for independent contractor status. Moreover, no case law has been located that addresses whether independent contractors are protected under the Human Rights Act.
Income Taxes	Virginia Department of Taxation	Internal Revenue Service (IRS) twenty-factor test.[7]
Unemployment Insurance	Virginia Employment Commission	IRS twenty-factor test.[8] Additionally, an individual that performs services for remuneration is considered an employee of the party that pays remuneration unless the individual or entity demonstrates the individual is an independent contractor. The state labor department will determine whether an individual is an independent contractor by applying Internal Revenue Service guidelines.[9]
Wage & Hour Laws	Virginia Department of Labor & Industry	IRS twenty-factor test.[10] Additionally, an individual that performs services for remuneration is considered an employee of the party that pays remuneration

[7] "Any term used in this chapter [covering income tax] shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required." VA. CODE ANN. § 58.1-301(A); *see also* Virginia Emp't Comm'n, *IRS 20 Factors and Virginia Exemptions for Employee Classification*, *available at* http://www.vec.virginia.gov/irs-20-factors-and-exemptions.

[8] "Services performed by an individual for remuneration shall be deemed to be employment subject to this title unless the Commission determines that such individual is not an employee for purposes of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, based upon an application of the 20 factors set forth in Internal Revenue Service Revenue Ruling 87-41, issued pursuant to 26 C.F.R. 31.3306(i)-1 and 26 C.F.R. 31.3121(d)-1." VA. CODE ANN. § 60.2-212(C). According to Virginia courts, the unemployment provisions are "to be liberally construed to effect [their] beneficent purpose and in borderline cases 'employment' should be found to exist." *Virginia Emp't Comm'n v. A.I.M. Corp.*, 302 S.E.2d 534, 539 (Va. 1983); *see also Chauncey F. Hutter, Inc. v. Virginia Emp't Comm'n*, 652 S.E.2d 151, 153 (Va. Ct. App. 2007). The Virginia Employment Commission has published guidance on its website regarding employee versus independent contractor status, available at http://www.vec.virginia.gov/employers/employee-or-independent-contractor and http://www.vec.virginia.gov/irs-20-factors-and-exemptions.

[9] VA. CODE ANN. § 58.1-1900(A).

[10] *Career Dev. Ctr., Inc. v. Virginia Emp't Comm'n*, 2021 WL 5893552 (Va. Ct. App. Dec. 14, 2021).

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		unless the individual or entity demonstrates the individual is an independent contractor. The state labor department will determine whether an individual is an independent contractor by applying Internal Revenue Service guidelines.[11]
Workers' Compensation	Virginia Workers' Compensation Commission	Statutory definition of "employee," plus the common-law right to control test. Additional factors that may be considered include: • the measure of compensation; • whether deductions are taken from compensation; • which party supplies tools and equipment; and • how hours of work are determined.[12] Additionally, an individual that performs services for remuneration is considered an employee of the party that pays remuneration unless the individual or entity demonstrates the individual is an independent contractor. The state labor department will determine whether an individual is an independent contractor by applying Internal Revenue Service guidelines.[13]
Workplace Safety	Virginia Occupational Safety and Health	While Virginia has a state approved plan under the federal Occupational Safety and Health Act, there are no relevant

[11] VA. CODE ANN. § 58.1-1900(A).

[12] VA. CODE ANN. § 65.2-101 (the definition of employee does not include "one whose employment is not in the usual course of the trade, business, occupation or profession of the employer"); *Creative Designs Tattooing Assocs. v. Estate of Parrish*, 693 S.E.2d 303, 307-10 (Va. Ct. App. 2010); *see also Dillon Constr. & Accident Fund Ins. Co. of Am. v. Carter*, 686 S.E.2d 542, 544 (Va. Ct. App. 2009) (citations omitted) (considering the following factors in evaluating independent contractor status: (1) selection and engagement of the servant; (2) payment of wages; (3) power of dismissal; and (4) power of control of the servant's action).

[13] VA. CODE ANN. § 58.1-1900(A).

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		statutory definitions or cases identifying a test for independent contractor status in this context.[14]

1.2 Employment Eligibility & Verification Requirements

1.2(a) *Federal Guidelines on Employment Eligibility & Verification Requirements*

The federal Immigration Reform and Control Act of 1986 (IRCA) prohibits knowingly employing workers who are not authorized to work in the United States. Under IRCA, an employer must verify each new hire's identity and employment eligibility. Employers and employees must complete the U.S. Citizenship and Immigration Service's Employment Eligibility Verification form (Form I-9) to fulfill this requirement. The employer must ensure that: (1) the I-9 is complete; (2) the employee provides required documentation; and (3) the documentation appears on its face to be genuine and to relate to the employee. If an employee cannot present the required documents within three business days of hire, the employee cannot continue employment.

Although IRCA requires employers to review specified documents establishing an individual's eligibility to work, it provides no way for employers to verify the documentation's legitimacy. Accordingly, the federal government established the "E-Verify" program to allow employers to verify work authorization using a computerized registry. Employers that choose to participate in the program must enter into a Memorandum of Understanding with the Department of Homeland Security (DHS) which, among other things, specifically prohibits employers from using the program as a screening device. Participation in E-Verify is generally voluntary, except for federal contractors with prime federal contracts valued above the simplified acquisition threshold for work in the United States, and for subcontractors under those prime contracts where the subcontract value exceeds $3,500.[15]

Federal legislative attempts to address illegal immigration have been largely unsuccessful, leading some states to enact their own immigration initiatives. Whether states have the constitutional power to enact immigration-related laws or burden interstate commerce with requirements in addition to those imposed by IRCA largely depends on how a state law intends to use an individual's immigration status. Accordingly,

[14] Relatedly, in June 2015, the Virginia Department of Labor and Industry issued a policy memorandum addressing worker misclassification in Virginia occupational safety and health cases. Commonwealth of Va., Dep't of Labor & Industry, *Addressing Misclassification of Employees in VOSH Cases* (June 2, 2015), *available at* https://doli.virginia.gov/virginia_occupational_safety_health_program/. Mostly this policy concerns sanctions, but the department's website also provides useful background materials regarding employee misclassification. *See* https://www.doli.virginia.gov/wp-content/uploads/2018/04/Policy-Memorandum-Addressing-Misclassification-of-Employees-in-VOSH-Cases-6-2-15-pdf.pdf.

[15] 48 C.F.R. §§ 22.1803, 52.212-5, and 52.222-54 (contracts for commercially available off-the-shelf items and contracts with a period of performance of less than 120 days are excluded from the E-Verify requirement). For additional information, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

state and local immigration laws have faced legal challenges.[16] An increasing number of states have enacted immigration-related laws, many of which mandate E-Verify usage. These state law E-Verify provisions, most of which include enforcement provisions that penalize employers through license suspension or revocation for knowingly or intentionally employing undocumented workers, have survived constitutional challenges.[17]

For more information on these topics, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.

1.2(b) *State Guidelines on Employment Eligibility & Verification Requirements*

1.2(b)(i) *Private Employers*

Generally, in Virginia, it is unlawful for any employer to knowingly employ, continue to employ, or to refer for employment any person who cannot provide documents indicating that they are legally eligible for employment in the United States.[18] Permits issued by the U.S. Department of Justice authorizing a person to work in the country constitute valid proof of eligibility for employment.[19]

Additionally, all employment application forms used by private employers operating in Virginia must ask prospective employees if they are legally eligible for employment in the United States.[20]

Virginia does not require private employers to enroll in and use E-Verify or any other electronic verification system for employment eligibility verification.

1.2(b)(ii) *State Contractors*

Public works contractors may not, during the performance of any contract for goods and services with the Commonwealth, knowingly employ an unauthorized person, as defined by the federal IRCA. Additionally, all public works contractors must affirm in their contracts with public agencies that they do not employ and will not employ unauthorized aliens.[21]

Moreover, "[a]ny employer with more than an average of 50 employees for the previous 12 months" that enters into a contract in excess of $50,000 with any Virginia agency to perform work or provide services must register and participate in the federal E-Verify program. Employers must use E-Verify to confirm the work authorization of all newly-hired employees performing work pursuant to a public contract.[22]

1.2(b)(iii) *State Enforcement, Remedies & Penalties*

Private Employers. Engaging in a pattern or practice of employing unauthorized persons is a Class 1 misdemeanor and may subject employers (or their officers, agents, or representatives) to imprisonment

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[16] *See, e.g.*, *Lozano v. Hazelton*, 496 F. Supp. 2d 477 (E.D. Pa. 2007), *aff'd*, 724 F.3d 297 (3d Cir. 2013) (striking down a municipal ordinance requiring proof of immigration status for lease and employment relationship purposes).

[17] *See Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582 (2011).

[18] VA. CODE ANN. § 40.1-11.1.

[19] VA. CODE ANN. § 40.1-11.1.

[20] VA. CODE ANN. § 40.1-11.1.

[21] VA. CODE ANN. § 2.2-4311.1.

[22] VA. CODE ANN. §§ 2.2-4308.2(B), 2.2-4317(E) (a state public body will deny prequalification to any contractor that fails to comply with the E-Verify requirement).

or fines.[23] Employers also may be subject to termination or revocation of their authority to do business in Virginia. Employers convicted of employing unauthorized workers must immediately report to the State Corporation Commission and file an authenticated judgment or record of conviction. Once the employer's authority to do business in Virginia is revoked or terminated, that entity may not be reinstated to do business for at least one year.[24]

State Contractors. A covered contractor that fails to comply with the E-Verify participation provisions is prohibited from contracting with any agency of Virginia for a period of up to one year.[25] However, the debarment may end upon the employer's registration and participation in the E-Verify program.[26]

1.3 Restrictions on Background Screening & Privacy Rights in Hiring

1.3(a) *Restrictions on Employer Inquiries About & Use of Criminal History*

1.3(a)(i) *Federal Guidelines on Employer Inquiries About & Use of Criminal History*

There is no applicable federal law restricting employer inquiries into an applicant's criminal history. However, the federal Equal Employment Opportunity Commission (EEOC) has issued enforcement guidance pursuant to its authority under Title VII of the Civil Rights Act of 1964 ("Title VII").[27] While there is uncertainty about the level of deference courts will afford the EEOC's guidance, employers should consider the EEOC's guidance related to arrest and conviction records when designing screening policies and practices. The EEOC provides employers with its view of "best practices" for implementing arrest or conviction screening policies in its guidance. In general, the EEOC's positions are:

1. **Arrest Records.** An exclusion from employment based on an arrest itself is not job related and consistent with business necessity as required under Title VII. While, from the EEOC's perspective, an employer cannot rely on arrest records alone to deny employment, an employer can consider the underlying conduct related to the arrest if that conduct makes the person unfit for the particular position.
2. **Conviction Records.** An employer with a policy that excludes persons from employment based on criminal convictions must show that the policy effectively links specific criminal conduct with risks related to the particular job's duties. The EEOC typically will consider three factors when analyzing an employer's policy: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense, conduct, and/or completion of the sentence; and (3) the nature of the job held or sought.

Employers should also familiarize themselves with the federal Fair Credit Reporting Act (FCRA), discussed in **1.3(b)(i)**. The FCRA does not restrict conviction-reporting *per se*, but impacts the reporting and consideration of criminal history information in other important ways.

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[23] VA. CODE ANN. §§ 40.1-11.1, 18.2-11A.

[24] VA. CODE ANN. § 13.1-753(A).

[25] VA. CODE ANN. § 2.2-4317(C).

[26] VA. CODE ANN. §§ 2.2-4308.2(B), 2.2-4317(E).

[27] EEOC, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e *et seq.* (Apr. 25, 2012), available at https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

For additional information on these topics, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

1.3(a)(ii) *State Guidelines on Employer's Use of Arrest Records*

No Virginia law imposes a complete prohibition on an employer's inquiry into or use of arrest records by private employers in the Commonwealth. In addition, Virginia has not implemented a state "ban-the-box" law covering private employers. Nonetheless, employers should exercise caution when inquiring into the criminal background of a prospective employee.

On the whole, employers that wish to obtain applicant or employee criminal history information may find that lack of access precludes the inquiry. Generally, no criminal justice agency or person may confirm "the existence or nonexistence of criminal history record information for employment" inquiries except as expressly permitted.[28] There are several narrow exceptions to this prohibition, including requests by individuals for a copy of their own criminal record at their own expense. Employers and prospective employers may obtain records if they present a written request by the individual whose conviction records are sought, so long as that individual also provided photo identification to the employer.[29]

Additionally, criminal history information may be provided to certain employers based on the nature of their work, such as adoption agencies, school boards of the Commonwealth, licensed nursing homes, hospitals, home care agencies, public utility companies, and other public services, public and nonprofit private colleges, and any other employer whose employees' duties require entry into the homes of others.[30] Records also may be provided to employers that require such information to implement certain federal or state statutes or executive orders; in that event, however, arrest records may not be disclosed if one year has elapsed since the arrest and there has been no active prosecution or final disposition.[31]

1.3(a)(iii) *State Guidelines on Employer's Use of Conviction Records*

Similarly, Virginia has no statute completely barring the inquiry into and use of conviction records by private employers. Employers or prospective employers seeking conviction information from Virginia's Central Criminal Records Exchange must first obtain written consent from the person on whom the information is being sought and must review their photo identification.[32]

1.3(a)(iv) *State Guidelines on Employer's Use of Sealed or Expunged Criminal Records*

An employer may not, "in an application, interview, or otherwise, require an applicant . . . to disclose information concerning any arrest, criminal charge, conviction, or civil offense" that has been expunged. Moreover, "[a]n applicant need not, in answer to any question concerning any arrest, criminal charge, conviction, or civil offense," provide any reference or information about arrests, charges, convictions, or civil offenses that have been expunged.[33] Nor may the application be rejected due solely to the applicant's

[28] VA. CODE ANN. § 19.2-389.

[29] VA. CODE ANN. § 19.2-389(H).

[30] VA. CODE ANN. § 19.2-389(A).

[31] VA. CODE ANN. § 19.2-389(A)(2).

[32] VA. CODE ANN. § 19.2-389(H).

[33] VA. CODE ANN. § 19.2-392.4.

refusal to disclose information concerning any expunged arrest, criminal charge, conviction, or civil offense.[34]

Juvenile Records. A person whose juvenile records have been destroyed may reply to inquiries by stating that no records exist.[35]

1.3(a)(v) *State Enforcement, Remedies & Penalties*

An employer that makes a prohibited inquiry about expunged records is guilty of a Class 1 misdemeanor.[36]

1.3(b) *Restrictions on Credit Checks*

1.3(b)(i) *Federal Guidelines on Employer's Use of Credit Information & History*

The Fair Credit Reporting Act (FCRA). The FCRA[37] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[38] regarding job applicants for use in hiring decisions or regarding employees for use in decisions concerning retention, promotion, or termination. Preemployment reports created by a consumer reporting agency (such as credit reports, criminal record reports, and department of motor vehicle reports) are subject to the FCRA, along with any other consumer report used for employment purposes.

The FCRA establishes procedures that an employer must strictly follow when using a consumer report for employment purposes. For example, before requesting a consumer report from a consumer reporting agency, the employer must notify the applicant or employee in writing that a consumer report will be requested and obtain the applicant's or employee's written authorization before obtaining the report. An employer that intends to take an adverse employment action, such as refusing to hire the applicant, based wholly or partly on information contained in a consumer report must also follow certain notification requirements. For additional information on the FCRA, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

Many states have enacted their own version of the FCRA, referred to as "mini-FCRAs." While these laws often mirror the FCRA's requirements, there may be important distinctions between federal and state requirements.

Discrimination Concerns. While federal law does not prevent employers from asking about financial information provided they follow the FCRA, as noted above, federal antidiscrimination law prohibits employers from applying a financial requirement differently based on an individual's protected status—*e.g.*, race, national origin, religion, sex, disability, age, or genetic information. The EEOC also cautions that an employer must not have a financial requirement "if it *does not help the employer to accurately identify*

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[34] VA. CODE ANN. § 19.2-392.4(B) (specifically addressing applicants for employment in state and local governments).

[35] VA. CODE ANN. § 16.1-306(E).

[36] VA. CODE ANN. § 19.2-392.4.

[37] 15 U.S.C. §§ 1681 *et seq*.

[38] A *consumer reporting agency* is any person or entity that regularly collects credit or other information about consumers to provide "consumer reports" for third persons. 15 U.S.C. § 1681a(f). A *consumer report* is any communication by a consumer reporting agency bearing on an individual's "creditworthiness, credit standing, character, general reputation, personal characteristics or mode of living" that is used for employment purposes. 15 U.S.C. § 1681a(d).

responsible and reliable employees, and if, at the same time, the requirement significantly disadvantages people of a particular [protected category]."[39]

1.3(b)(ii) *State Guidelines on Employer's Use of Credit Information & History*

Virginia does not have a mini-FCRA law, and there are no additional state provisions specifically restricting a private employer's use of credit information and history.

1.3(c) *Restrictions on Access to Applicants' Social Media Accounts*

1.3(c)(i) *Federal Guidelines on Access to Applicants' Social Media Accounts*

There is no federal law governing an employer's ability to request access to applicants' or employees' social media accounts. However, various federal laws, or federal agencies' interpretations and enforcement of these laws, may impact employer actions. For example:

- Preemployment action taken against an applicant, or post-employment action taken against an employee, based on information discovered via social media may run afoul of federal civil rights law (*e.g.*, Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act).
- The National Labor Relations Board, which is charged with enforcing federal labor laws, has taken an active interest in employers' social media policies and practices, and has concluded in many instances that, regardless of whether the workplace is unionized, the existence of such a policy or an adverse employment action taken against an employee based on the employee's violation of the policy can violate the National Labor Relations Act.
- Accessing an individual's social media account without permission may potentially violate the federal Computer Fraud and Abuse Act or the Stored Communications Act.

For additional information on federal law related to background screening, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

1.3(c)(ii) *State Guidelines on Access to Applicants' Social Media Accounts*

Virginia restricts an employer's access to a job applicant's and employee's social media accounts. An employer is prohibited from:

- requiring an employee or applicant to disclose the individual's social media account username and password;
- requiring an employee or applicant to add an employee, supervisor, or administrator to the contact list of the individual's social media account; or
- failing or refusing to hire an applicant because they exercised rights provided under the statute, or taking action against, or threatening to fire, discipline, or otherwise penalize an employee because the individual exercised rights provided under the law.[40]

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[39] EEOC, *Pre-Employment Inquiries and Financial Information*, *available at* https://www.eeoc.gov/laws/practices/financial_information.cfm (emphasis in original).

[40] VA. CODE ANN. § 40.1-28.7:5.

Social media account means "a personal account with an electronic medium or service where users may create, share, or view user-generated content, including, without limitation, videos, photographs, blogs, podcasts, messages, emails, or website profiles or locations."[41]

Exceptions. The statute does not prevent an employer from viewing information about an employee or applicant that is publicly available. Further, the law does not prevent an employer from complying with federal, state, or local laws, rules, or regulations, or the rules or regulations of self-regulatory organizations.[42]

An employer can request that an employee disclose their social media account username and password if the account "is reasonably believed to be relevant to a formal investigation or related proceeding by the employer" concerning allegations that the employee violated federal, state, or local law, or the employer's written policies. However, if an employer exercises this right, the employee's username and password can be used for these purposes only.[43]

In addition, the statute does not protect certain types of accounts, such as those that are employer-provided. Indeed, the statutory definition of *social media account* specifically does not include an account:

- opened or set up by an employee at the employer's request;
- provided to an employee by an employer (*e.g.*, company email, other software program owned or operated exclusively by the employer); or
- set up by an employee to impersonate an employer by using the employer's name, logos, or trademarks.[44]

If an employer inadvertently receives an employee's social media account username, password, or other login information because the employee uses an employer-provided electronic device, or via a program monitoring an employer's network, the employer is not liable for having the information but cannot use the information to gain access to the account.[45]

1.3(d) *Polygraph / Lie Detector Testing Restrictions*

1.3(d)(i) *Federal Guidelines on Polygraph Examinations*

The federal Employee Polygraph Protection Act (EPPA) imposes severe restrictions on using lie detector tests.[46] The law bars most private-sector employers from requiring, requesting, or suggesting that an employee or job applicant submit to a polygraph test, and from using or accepting the results of such a test.

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[41] VA. CODE ANN. § 40.1-28.7:5(A).

[42] VA. CODE ANN. § 40.1-28.7:5.

[43] VA. CODE ANN. § 40.1-28.7:5.

[44] VA. CODE ANN. § 40.1-28.7:5.

[45] VA. CODE ANN. § 40.1-28.7:5.

[46] 29 U.S.C. §§ 2001 to 2009; *see also* U.S. Dep't of Labor, *Other Workplace Standards: Lie Detector Tests*, *available at* https://webapps.dol.gov/elaws/elg/eppa.htm.

The EPPA further prohibits employers from disciplining, discharging, or discriminating against any employee or applicant:

- for refusing to take a lie detector test;
- based on the results of such a test; and
- for taking any actions to preserve employee rights under the law.

There are some limited exceptions to the general ban. The exception applicable to most private employers allows a covered employer to test current employees reasonably suspected of involvement in a workplace incident that resulted in economic loss or injury to the employer's business. There is also a narrow exemption for prospective employees of security guard firms and companies that manufacture, distribute, or dispense controlled substances.

Notably, the EPPA prohibits only mechanical or electrical devices, not paper-and-pencil tests, chemical tests, or other nonmechanical or nonelectrical means that purport to measure an individual's honesty. For more information on federal restrictions on polygraph tests, including specific procedural and notice requirements and disclosure prohibitions, see **LITTLER ON EMPLOYMENT TESTING**.

Most states have laws that mirror the federal law. Some of these state laws place greater restrictions on testing by prohibiting lie detector "or similar" tests, such as pencil-and-paper honesty tests.

1.3(d)(ii) *State Guidelines on Polygraph Examinations*

Virginia employers may administer polygraph examinations but cannot require applicants to answer certain questions during those tests as a condition of employment. Specifically, Virginia law prohibits questions regarding a prospective employee's sexual preferences or activities in polygraph tests required for employment, unless the activities resulted in a criminal conviction for violation of Virginia law.[47] In addition, polygraph tests may not include questions regarding an individual's lawful religious affiliations, political affiliations, or labor activities.[48]

The examiner must obtain prior written consent from the prospective examinee, who is also entitled to a tape recording of the administered examination and a copy of any subsequent written report.[49] Moreover, any written record of the results of a polygraph test given to a prospective employee by an employer must be either destroyed or kept confidential and released only with the employee's written consent.[50]

1.3(d)(iii) *State Enforcement, Remedies & Penalties*

Violation of the polygraph provisions regarding restricted questions is a Class 1 misdemeanor.[51]

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[47] VA. CODE ANN. § 40.1-51.4:3; 18 VA. ADMIN. CODE § 120-30-220.

[48] 18 VA. ADMIN. CODE § 120-30-220.

[49] 18 VA. ADMIN. CODE §§ 120-30-200, 120-30-210.

[50] VA. CODE ANN. § 40.1-51.4:3.

[51] VA. CODE ANN. § 40.1-51.4:3.

1.3(e) *Drug & Alcohol Testing of Applicants*

1.3(e)(i) *Federal Guidelines on Drug & Alcohol Testing of Applicants*

Whether an employer must implement a drug testing program for its employees under federal law is often determined by the industry in which it operates. For example, the Omnibus Transportation Employee Testing Act requires testing certain applicants and employees in the transportation industries.[52] The Drug-Free Workplace Act of 1988 also requires some federal contractors and all federal grantees (but not subcontractors or subgrantees) to certify to the appropriate federal agency that they are providing a drug-free workplace.[53] Employers not legally mandated to implement workplace substance abuse and drug and alcohol testing policies may still do so to promote workplace safety, deter illegal drug use, and diminish absenteeism and turnover. For more information on drug testing requirements under federal law, see LITTLER ON EMPLOYMENT TESTING.

For the most part, workplace drug and alcohol testing is governed by state law, and state laws differ dramatically in this area and continue to evolve.

1.3(e)(ii) *State Guidelines on Drug & Alcohol Testing of Applicants*

There are no statutory limitations on a private employer's right to conduct drug testing of applicants or employees in Virginia. Therefore, Virginia employers may implement drug and alcohol testing programs at their own discretion.

State Contractors. Public contractors, however, must agree to provide a drug-free workplace for the duration of any state contract over $10,000 and must also state the same in all solicitations or advertisements for employment. These public contractors must also post, in conspicuous places accessible by both employees and applicants, a statement noting that the unlawful manufacture, sale, distribution, dispensation, possession, or use of an illegal substance is prohibited in the workplace. All of these provisions must be outlined in the state contract over $10,000 and must also be included in every subcontract or purchase over $10,000 so that the provisions will be binding upon each subcontractor or vendor.[54]

1.3(f) *Additional State Guidelines on Preemployment Conduct*

1.3(f)(i) *State Restrictions on Job Application Fees, Deductions, or Other Charges*

Employers cannot require employees or applicants to pay the costs of required medical examinations or for furnishing medical records required as a condition of employment.[55]

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[52] These industries are covered by the Federal Aviation Administration (FAA); the Federal Motor Carrier Safety Administration (FMSCA); the Federal Railroad Administration (FRA); the Federal Transit Administration (FTA); and the Pipeline and Hazardous Materials Safety Administration (PHMSA). In addition, the U.S. Department of Defense, the Coast Guard, and the Nuclear Regulatory Commission, as well as other government agencies, have adopted regulations requiring mariners, employers, and contractors to maintain a drug-free workplace.

[53] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

[54] VA. CODE ANN. § 2.2-4312.

[55] VA. CODE ANN. § 40.1-28.

2. TIME OF HIRE

2.1 Documentation to Provide at Hire

2.1(a) *Federal Guidelines on Hire Documentation*

Table 2 lists the documents that must be provided at the time of hire under federal law.

Table 2. Federal Documents to Provide at Hire

Category	Notes
Benefits & Leave Documents: Affordable Care Act (ACA)	Currently, employers covered under the Fair Labor Standards Act (FLSA) must provide to each employee, at the time of hire, written notice: • informing the employee of the existence of an insurance exchange, including a description of the services provided by such exchange, and the manner in which the employee may contact the exchange to request assistance; • that if the employer-plan's share of the total allowed costs of benefits provided under the plan is less than 60% of such costs, the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code of 1986[56] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[57] if the employee purchases a qualified health plan through the exchange; and • that if the employee purchases a qualified health plan through the exchange, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for federal income tax purposes.58 The U.S. Department of Labor's Employee Benefits Security Administration provides a model notice for employers that offer a health plan to some or all employees and a separate notice for employers that do not offer a health plan.[59]
Benefits & Leave Documents: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Employers or group health plan administrators must provide written notice to employees and their spouses outlining their COBRA rights no later than 90 days after employees and spouses become covered under group health plans. Employers or plan administrators can develop their own COBRA rights notice or use the COBRA Model General Notice.[60]

[56] 26 U.S.C. § 36B.

[57] 42 U.S.C. § 18071.

[58] 29 U.S.C. § 218b.

[59] Model notices are available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/coverage-options-notice.

[60] The model notice is available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	Employers or plan administrators can send COBRA rights notices through first-class mail, electronic distribution, or other means that ensure receipt. If employees and their spouses live at the same address, employers or plan administrators can mail one COBRA rights notice addressed to both individuals; alternatively, if employees and their spouses do not live at the same address, employers or plan administrators must send separate COBRA rights notices to each address.[61]
Benefits & Leave Documents: Family and Medical Leave Act (FMLA)	In addition to posting requirements, if an FMLA-covered employer has any eligible employees, it must provide a general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring.[62] In either case, distribution may be accomplished electronically. Employers may use a format other than the FMLA poster as a model notice, if the information provided includes, at a minimum, all of the information contained in that poster.[63] Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer must provide the general notice in a language in which the employees are literate. Employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under federal or state law.[64]
Immigration Documents: Form I-9	Employers must ensure that individuals properly complete Form I-9 section 1 ("Employee Information and Verification") at the time of hire and sign the attestation with a handwritten or electronic signature. Also, individuals must present employers documentation establishing their identity and employment authorization. Within three business days of the first day of employment, employers must physically examine the documentation presented in the employee's presence, ensure that it appears to be genuine and relates to the individual, and complete Form I-9, section 2 ("Employer Review and Verification"). Employers must also, within three business days of hiring, sign the

[61] 29 C.F.R. § 2590.606-1.

[62] 29 C.F.R. § 825.300(a).

[63] The U.S. Department of Labor's Wage & Hour Division's model FMLA poster, which satisfies the notice requirement, is available at https://www.dol.gov/WHD/fmla/index.htm.

[64] 29 C.F.R. § 825.300(a).

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	attestation with a handwritten or electronic signature. Employers that hire individuals for a period of less than three business days must comply with these requirements at the time of hire.[65] For additional information on these requirements, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.
Tax Documents	On or before the date employment begins, employees must furnish employers with a signed withholding exemption certificate (Form W-4) relating to their marital status and the number of withholding exemptions they claim.[66]
Uniformed Services Employment and Reemployment Rights Act (USERRA) Documents	Employers must provide to persons covered under USERRA a notice of employee and employer rights, benefits, and obligations. Employers may meet the notice requirement by posting notice where employers customarily place notices for employees.[67]
Wage & Hour Documents	To qualify for the federal tip credit, employers must notify tipped employees: (1) of the minimum cash wage that will be paid; (2) of the tip credit amount, which cannot exceed the value of the tips actually received by the employee; (3) that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and (4) that the tip credit will not apply to any employee who has not been informed of these requirements.[68]

2.1(b) *State Guidelines on Hire Documentation*

Table 3 lists the documents that must be provided at the time of hire under state law.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents	Virginia requires a state-facilitated IRA savings program for private-sector workers that work for employers with 25 or more employees.[69] Each eligible employee of an eligible employer will be enrolled in the

[65] *See generally* 8 C.F.R. § 274a.2. The form is available at https://www.uscis.gov/i-9.

[66] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

[67] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

[68] 29 C.F.R. § 531.59.

[69] VA. CODE ANN.§ 2.2-2744.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	program unless the employee elects not to participate. A participating employee may also terminate participation at any time.[70]
Fair Employment Practices Documents: Disabilities Accommodation Notice	Employers with five or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year must post a notice informing employees of their rights to reasonable accommodation for disabilities in a conspicuous location.[71] This information must also be included in any employee handbook. Moreover, employers must directly provide this notice to: (1) new employees upon commencement of their employment; and (2) any employee within 10 days of the employee's providing notice to the employer that the employee has a disability.
Fair Employment Practices Documents: Pregnancy Discrimination Notice	Covered employers with five or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year must post in a conspicuous location and include in any employee handbook information concerning: (1) the prohibition against unlawful discrimination on the basis of pregnancy, childbirth, or related medical conditions including lactation; and (2) an employee's right to reasonable accommodation for known limitations related to pregnancy, childbirth, or related medical conditions. This information also must be directly provided to: (1) new employees upon commencement of their employment; and (2) any employee within 10 days of the employee's providing notice to the employer that they are pregnant.[72]
Tax Documents	All employees must, when employment begins, furnish employers with a signed withholding exemption certificate (Form VA-4) relating to the withholding exemptions they claim.[73]
Wage & Hour Documents	No notice requirement located.

[70] VA. CODE ANN. § 2.2-2751.

[71] VA. CODE ANN. § 2.2-3905.1. The poster "Virginia Human Rights Act Reasonable Accommodations for Pregnancy" is available at https://www.doli.virginia.gov/wp-content/uploads/2020/11/OUTREACH_INFO-SHEET_PREGNANCY-DISCN-PROVISIONS_2020-07-17_FINAL.pdf.

[72] VA. CODE ANN. § 2.2-3909. Virginia DHR's "Pregnancy Discrimination Information Sheet," which includes the required information, is available at https://www.vdh.virginia.gov/content/uploads/sites/118/2020/07/OUTREACH_INFO-SHEET_PREGNANCY-DISCN-PROVISIONS_2020-07-17_FINAL.pdf.

[73] VA. CODE ANN. § 58.1-470. The Virginia employee withholding exemption certificate is available at https://www.tax.virginia.gov/sites/default/files/taxforms/withholding/any/va-4-any.pdf. Additional withholding forms and information, including instructions for employers, are available at https://www.tax.virginia.gov/forms/search?category=6.

2.2 New Hire Reporting Requirements

2.2(a) *Federal Guidelines on New Hire Reporting*

The federal New Hire Reporting Program requires all states to establish new hire reporting laws that comply with federal requirements.[74] State new hire reporting laws must include these minimum requirements:

1. employers must report to the appropriate state agency the employee's name, address, and Social Security number, as well as the employer's name, address, and federal tax identification number provided by the Internal Revenue Service;
2. employers may file the report by first-class mail, electronically, or magnetically;
3. if the report is transmitted by first-class mail, the report must be made not later than 20 days after the date of hire;
4. if the report is transmitted electronically or magnetically, the employer may report no later than 20 days following the date of hire or through two monthly transmissions not less than 12 days nor more than 16 days apart;
5. the format of the report must be a Form W-4 or, at the option of the employer, an equivalent form; and
6. the maximum penalty a state may set for failure to comply with the state new hire law is $25 (which increases to $500 if the failure to comply is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report).[75]

These are only the minimum requirements that state new hire reporting laws must satisfy. States may enact new hire reporting laws that, for example, require additional information to be submitted or require a shorter reporting timeframe. Many states have also developed their own reporting form; however, its use is optional.

Multistate Employers. The New Hire Reporting Program includes a simplified reporting method for multistate employers. The statute defines *multistate employers* as employers with employees in two or more states and that file new hire reports either electronically or magnetically. The federal statute permits multistate employers to designate one state to which they will transmit all of their reports twice per month, rather than filing new hire reports in each state. An employer that designates one state must notify the Secretary of the U.S. Department of Health and Human Services (HHS) in writing. When notifying the HHS, the multistate employer must include the following information:

- Federal Employer Identification Number (FEIN);
- employer's name, address, and telephone number related to the FEIN;
- state selected for reporting purposes;
- other states in which the company has employees;

[74] The New Hire Reporting Program is part of the Personal Responsibility and Work Opportunity Act of 1996. 42 U.S.C. §§ 651 to 669.

[75] 42 U.S.C. § 653a.

- the corporate contact information (name, title, phone, email, and fax number); and
- the signature of person providing the information.

If the company is reporting new hires on behalf of subsidiaries operating under different names and FEINs, it must list the names and FEINs, and the states where those subsidiaries have employees working.

Multistate employers can notify the HHS by mail, fax, or online as follows:

Table 4. Multistate Employer New Hire Information

Contact By Mail or Fax	Contact Online
Department of Health and Human Services Administration for Children and Families Office of Child Support Enforcement Multi-State Employer Registration Box 509 Randallstown, MD 21133 Fax: (410) 277-9325	Register online by submitting a multistate employer notification form over the internet.[76] Multistate employers can receive assistance with registration as a multistate employer from the Multistate Help Desk by calling (410) 277-9470, 9:00 A.M. to 5:00 P.M., Eastern Time.

2.2(b) *State Guidelines on New Hire Reporting*

The following is a summary of the key elements of Virginia's new hire reporting law.[77]

Who Must Be Reported. Virginia employers must report newly-hired employees, as well as individuals who were previously employed by the employer but have been separated from the previous employment for at least 60 consecutive days and have returned to work after being laid off, furloughed, separated, granted an unpaid leave, or terminated.[78]

Report Timeframe. Employers must report new hires and rehires within 20 days of the hiring date. If submitted magnetically or electronically, employers may report twice per month (if necessary), not less than 12 nor more than 16 days apart.[79]

Information Required. Employers must report each employee's name, address, Social Security number, and the date services for remuneration were first performed. The employer must also supply its name, address, and federal employer identification number.[80]

Form & Submission of Report. The information may be presented on a federal Form W-4, New Hiring Reporting Form, or a printed list containing all required information. Reports may be submitted by mail,

[76] HHS offers the form online at http://www.acf.hhs.gov/programs/css/resource/multistate-employer-registration-form-instructions.

[77] VA. CODE ANN. § 63.2-1946.

[78] VA. CODE ANN. § 63.2-1946(B).

[79] VA. CODE ANN. § 63.2-1946(C).

[80] VA. CODE ANN. § 63.2-1946(E).

fax, electronically (including online), magnetically, using new hire data software, or by any other approved means.[81]

Location to Send Information.

Virginia New Hire Reporting Center
P.O. Box 25309
Richmond, VA 23260-5309
(800) 979-9014
(804) 771-9709 (fax)
(800) 688-2680 (fax)
https://va-newhire.com/

Multistate Employers. Employers that have employees who are employed in two or more states, and that transmit reports magnetically or electronically, may comply by designating one state in which such employer has employees for reporting purposes. Upon such designation, the employer will transmit all reports to the selected state. Such employers must notify the federal Secretary of HHS in writing as to which state is designated for the purpose of sending reports and must provide a copy of that notification to the Virginia New Hire Reporting Center.[82]

2.3 Restrictive Covenants, Trade Secrets & Protection of Business Information

2.3(a) *Federal Guidelines on Restrictive Covenants & Trade Secrets*

Restrictive covenants are limitations placed on an employee's conduct that remain in force after their employment has ended. Post-employment restrictions are designed to protect the employer and typically prevent an individual from disclosing the employer's confidential information or soliciting the employer's employees or customers. These restrictions may also prohibit individuals from engaging in competitive employment, including competitive self-employment, for a specific time period after the employment relationship ends. There is no federal law governing these types of restrictive covenants. Therefore, a restrictive covenant's ability to protect an employer's interests is dependent upon applicable state law and the type of relationship or covenant involved.

As a general rule, a covenant restraining competition (referred to as a "noncompete") is more likely to be viewed critically because restraints of trade are generally disfavored. The typical exception to this general rule is a reasonable restraint that has a legitimate business purpose, such as the protection of trade secrets, confidential information, customer relationships, business goodwill, training, or the sale of a business. Notwithstanding, state laws vary widely regarding which of these interests can be protected through a restrictive covenant. Even where states agree on the interest that can be protected, they may vary on what is seen as a reasonable and enforceable provision for such protection.

Protections against trade secret misappropriation are also available to employers. Until 2016, trade secrets were the only form of intellectual property (*i.e.*, copyrights, patents, trademarks) not predominately governed by federal law. However, the Defend Trade Secrets Act of 2016 (DTSA) now provides a federal court civil remedy and original (but not exclusive) jurisdiction in federal court for claims of trade secret misappropriation.[83] As such, the DTSA provides trade secret owners a uniform federal law

[81] VA. CODE ANN. § 63.2-1946(E).

[82] VA. CODE ANN. § 63.2-1946(C).

[83] 18 U.S.C. §§ 1832 *et seq.*

under which to pursue such claims. The DTSA operates alongside more limited existing protections under the federal Economic Espionage Act of 1996 and the Computer Fraud and Abuse Act, as well as through state laws adopting the Uniform Trade Secrets Act (UTSA).

For more information on these topics, see LITTLER ON PROTECTION OF BUSINESS INFORMATION & RESTRICTIVE COVENANTS.

2.3(b) *State Guidelines on Restrictive Covenants & Trade Secrets*

2.3(b)(i) *State Restrictive Covenant Law*

Generally. Although disfavored as restraints on trade, Virginia courts will enforce covenants not to compete if the covenant is "narrowly drawn to protect the employer's legitimate business interest, is not unduly burdensome on the employee's ability to earn a living, and is not against public policy."[84] To analyze these three factors, courts consider the restrictions in terms of function, geographic scope, and duration. Generally, temporal and geographic restrictions must be no greater than those that are necessary to protect the employer in some legitimate business interest.[85] The employer has the burden of proving that the restraint is reasonable, and typically courts strictly construe an agreement against the employer.[86]

Although a court will analyze each limit individually, the effect of the restrictions, taken as a whole, will impact the enforceability of the agreement. For example, a broad geographic limitation may be upheld if the time limit is short.[87] In 2005, the Virginia Supreme Court held an agreement to be unenforceable that was limited to contact with one customer of the employer but broadly restricted the scope of the activity.[88] An employee's role or position may also impact a court's analysis. For example, a court may be more likely to enforce a broad noncompetition agreement against a former chief executive officer than against a technical writer or sales employee.[89]

Contrary to prior court rulings, Virginia no longer permits broad employment prohibitions that would prevent former employees from working for a competitor in any capacity. Nicknamed the "Janitor Rule," noncompete agreements that restrict an employee from working for a competitor in any role, even as a janitor, will be found to be overbroad. In *Home Paramount Pest Control Companies v. Shaffer*, the Virginia Supreme Court held that the noncompete provision preventing work for a competitor "in any matter whatsoever" was overbroad and unenforceable because it prohibited the employee from engaging in "all

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[84] *Omniplex World Servs. Corp. v. US Investigations Servs.*, 618 S.E.2d 340, 342 (Va. 2005); *Simmons v. Miller*, 544 S.E.2d 666, 678 (Va. 2001).

[85] *Simmons*, 544 S.E.2d at 678.

[86] *Grant v. Carotek, Inc.*, 737 F.2d 410, 411-12 (4th Cir. 1984); *see also Clinch Valley Physicians, Inc. v. Garcia*, 414 S.E.2d 599, 601 (Va. 1992) (restrictive covenant not enforced when language of contract strictly construed made noncompetition portion of agreement inapplicable).

[87] *James, Ltd. v. Saks Fifth Ave., Inc.*, 67 Va. Cir. 126 (Va. Cir. Ct. 2005), *rev'd in part on other grounds*, 630 S.E.2d 304 (Va. 2006) (enforcing a noncompete with one-mile, three-year restriction because it was not overbroad); *Cliff Simmons Roofing, Inc. v. Cash*, 49 Va. Cir. 156, 157 (Va. Cir. Ct. 1999) (holding that a noncompete contract with no geographical boundaries is unenforceable). *But see Leddy v. Communication Consultants, Inc.*, 51 Va. Cir. 467, 470 (Va. Cir. Ct. 2000) (finding two-year covenant with no geographical limitation not unduly restrictive).

[88] *Omniplex World Servs. Corp.*, 618 S.E.2d at 343.

[89] *See Johnson v. MPR Assocs., Inc.*, 894 F. Supp. 255, 257 (E.D. Va. 1994).

reasonably conceivable activities while employed by a competitor."[90] Notably, even narrow geographic and temporal restraints could not save the restriction to make the covenant enforceable.

Enforceability Following Employee Discharge. While there is no definitive case law or statute on point, in the context of a physician contract nonrenewal that contained a noncompete agreement, the Virginia Supreme Court held that application of the noncompete was limited to terminations for cause—despite the contract language stating that the noncompete would go into effect "for any reasons whatsoever."[91]

Low Wage Employees. An employer cannot enter into, enforce, or threaten to enforce a covenant not to compete with any low-wage employee. The law defines a *covenant not to compete* as a covenant or agreement, including a provision of an employment contract, between an employer and employee that restrains, prohibits, or otherwise restricts an individual's ability, following the termination of the individual's employment, to compete with the former employer.

A covenant not to compete cannot restrict an employee from providing a service to a customer or client of the employer so long as the employee does not initiate contact with or solicit the customer or client. Thus, the law does not wholly prohibit non-solicitation agreements. Moreover, an employer can still limit the creation or application of nondisclosure agreements intended to prohibit taking, misappropriating, threating to misappropriate, or sharing certain information, including trade secrets and proprietary or confidential information.

A *low-wage employee* is an employee whose average weekly earnings, calculated by dividing the employee's earnings during the period of 52 weeks immediately before the date of termination of employment by 56, or if an employee worked fewer than 52 weeks, by the number of weeks that the employee was actually paid during the 52-week period, are less than the average weekly wage. For purposes of the law, the following categories of workers are also considered low-wage employees:

- interns, students, apprentices, or trainees employed, with or without pay, at a trade or occupation in order to gain work or educational experience; and
- independent contractors compensated for their services at an hourly rate that is less than the median hourly wage.

The definition expressly excludes any employee whose earnings are derived, in whole or in predominant part, from sales commissions, incentives, or bonuses paid to the employee by the employer.

The law permits a low-wage employee to bring a civil action against any former employer or other person that attempts to enforce a covenant not to compete in violation of the new law. The court can void any covenant not to compete with a low-wage employee and order all appropriate relief, including enjoining the conduct of any person or employer, ordering payment of liquidated damages, and awarding lost compensation, damages, and reasonable attorney fees and costs. An employer found to be in violation of the law may also incur a civil penalty of $10,000 for each violation. The law also prohibits an employer from discharging, threatening, or otherwise discriminating or retaliating against a low-wage employee for

[90] 718 S.E.2d 762, 765 (Va. 2011).

[91] *Clinch Valley Physicians, Inc.*, 414 S.E.2d 599; *see also Worrie v. Boze*, 62 S.E.2d 876 (Va. 1951) (enforcing noncompete despite employee's contention he was wrongfully discharged without cause because evidence supported that dismissal was for just cause). *But see Blue Ridge Anesthesia & Critical Care, Inc. v. Gidick*, 389 S.E.2d 467 (Va. 1990) (enforcing noncompetes against three defendants where one was discharged).

bringing a civil action to enforce this law. Every employer must post a copy of the law or a summary approved by the Department of Labor and Industry in the same location where other employee notices required by state or federal law are posted. Failure to post the notice as required may result in a written warning or civil penalties.[92]

2.3(b)(ii) *Consideration for a Noncompete*

Restrictive covenants require an employee to promise not to do something the employee would otherwise have been able to do. For example, by signing a noncompete agreement, an employee is giving up the right to open a competing business or work for an employer in a competing business. Therefore, employers need to provide an employee with "consideration" in return for the agreement to be binding. Providing consideration means giving something of value—*i.e.*, a promise to do something that the employer was not otherwise obligated to do—such as extending an offer of employment to a new employee or providing a bonus for an existing employee.

Virginia courts have implicitly accepted the sufficiency of consideration of noncompetes entered into at the beginning of employment by enforcing them.[93] In addition, courts have found that continued at-will employment is sufficient consideration.[94]

2.3(b)(iii) *Ability to Modify or Blue Pencil a Noncompete*

When a restrictive covenant is found to be unreasonable in scope, some states refuse to enforce its terms entirely (sometimes referred to as the "all-or-nothing" rule), while others may permit the court to "blue pencil" or modify an agreement that is unenforceable as written. *Blue penciling* refers to the practice whereby a court strikes portions of a restrictive covenant it deems unenforceable. *Reformation*, on the other hand, refers to a court modifying a restrictive covenant to make it enforceable, which may include introducing new terms into the agreement (sometimes referred to as the "reasonableness" rule). By rewriting an overly broad restrictive covenant rather than simply deeming it unenforceable, courts attempt to effectuate the parties' intentions as demonstrated by their agreement to enter into a restrictive covenant in the first place.

Unlike many states, Virginia circuit courts will not blue pencil noncompete clauses.[95] Courts may enforce reasonable covenants that are severable from and independent of other portions of an agreement that are unenforceable, but employers should proceed cautiously given conflicting interpretations of severability clauses.[96]

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[92] VA. CODE ANN. § 40.1-28.7:7.

[93] *See, e.g.*, *Blue Ridge Anesthesia & Critical Care*, 389 S.E.2d 467.

[94] *Paramount Termite Control v. Rector*, 380 S.E.2d 922, 926 (Va. 1989), *overruled in part on other grounds*, *Home Paramount Pest Control Cos. v. Shaffer*, 718 S.E.2d 762 (Va. 2011); *Alan J. Zuccari, Inc. v. Adams*, 42 Va. Cir. 132, 135 (Va. Cir. Ct. 1997) (continued employment under an at-will contract is sufficient consideration); *see also Phoenix Renovation Corp. v. Rodriguez*, 461 F. Supp. 2d 411, 425 (E.D. Va. 2006). *But see Mona Elec. Grp., Inc. v. Truland Serv. Corp.*, 193 F. Supp. 2d 874, 876 (E.D. Va. 2002) (predicting that the Virginia Supreme Court would find continued employment alone is insufficient consideration in Virginia).

[95] *Reading & Language Learning Ctr. v. Sturgill*, 94 Va. Cir. 94, 104 (Va. Cir. Ct. 2016); *Lasership, Inc. v. Watson*, 2009 WL 7388870, *9-10 (Va. Cir. Ct. 2009).

[96] *Compare Roto-Die, Inc. v. Lesser*, 899 F. Supp. 1515, 1522 (W.D. Va. 1995) (unenforceable provisions were severed), *and Totten v. Employee Benefits Mgmt.*, 61 Va. Cir. 77, 78 (Va. Cir. Ct. 2003) (despite fact that the severability clause was an unenforceable blue pencil provision, court severed unenforceable nonsolicitation

2.3(b)(iv) *State Trade Secret Law*

Definition of a Trade Secret. Under the Virginia Uniform Trade Secrets Act, *trade secret* refers to

> information, including but not limited to a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> 1. derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> 2. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[97]

With respect to the definition of a trade secret, the Virginia Supreme Court has explained that the crucial characteristic of a trade secret is the fact of its secrecy, rather than its novelty.[98] The burden rests on the proprietor of the trade secret to make reasonable efforts to maintain its secrecy. Nevertheless, the secrecy need not be absolute and the owner of a trade secret may, without losing protection, disclose it to a licensee, an employee, or a stranger if the disclosure is made in express or implied confidence.[99] Therefore, trade secrets can include such items as customer lists and price lists.[100]

Examples of reasonable efforts to maintain secrecy can include a policy of not disclosing the information to anyone outside of the company, locking the offices containing the information to be protected at all times, requiring visitors to sign in, and clearly informing employees, verbally and in writing, that certain (clearly enumerated) proprietary information and trade secrets are confidential and must not be disclosed.[101]

Nondisclosure Agreements. Companies can take steps to ensure that employees maintain the confidentiality of trade secrets and other private information by utilizing nondisclosure agreements. Nondisclosure agreements are a type of restrictive covenant. Whether restrictive provisions in an

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provision from enforceable confidentiality provision), *with BB&T Ins. Servs. v. Thomas Rutherfoord, Inc.*, 80 Va. Cir. 174, 181 (Va. Cir. Ct. 2010) (suggesting that the inclusion of blue pencil language in the agreement might contribute to a noncompete agreement being found unenforceable in its entirety because such provisions have been deemed invalid), *and Lasership, Inc.*, 2009 WL 7388870 at *9-10 (noting judicial reformation of restrictive covenants is discouraged and declining to follow a contractual clause granting courts authority to modify invalid terms because it is subject to the same rationale restricting the blue pencil doctrine in Virginia).

[97] VA. CODE ANN. § 59.1-336.

[98] *Dionne v. Southeast Foam Converting & Packaging, Inc.*, 397 S.E.2d 110, 113 (Va. 1990).

[99] *Tao of Sys. Integration, Inc. v. Analytical Servs. & Materials, Inc.*, 330 F. Supp. 2d 668, 676 (E.D. Va. 2004), *aff'd*, 141 F. App'x 129 (4th Cir. 2005); *Young Design, Inc. v. Teletronics Int'l, Inc.*, 2001 WL 35804500, at **4-5 (E.D. Va. July 31, 2001).

[100] *American Sales Corp. v. Adventure Travel, Inc.*, 862 F. Supp. 1476 (E.D. Va. 1994), *modified on reconsideration*, 867 F. Supp. 378 (E.D. Va. 1994); *International Paper Co. v. Gilliam*, 63 Va. Cir. 485, 98 (Va. Cir. Ct. 2003); *cf. Tryco, Inc. v. U.S. Med. Source, L.L.C.*, 80 Va. Cir. 619, 625 (Va. Cir. Ct. 2010) (however, an outdated customer list or other outdated document provides no independent economic value if the information in it is stale).

[101] *Avtec Sys., Inc., v. Peiffer*, 805 F. Supp. 1312, 1320 (E.D. Va. 1992), *aff'd as modified*, 21 F.3d 568 (4th Cir. 1994); *see also Tritec Assocs., Inc. v. Stiles Mach. Inc.*, 48 Va. Cir. 40 (Va. Cir. Ct. 1999) (defendant prevailed in claim for misappropriation of trade secrets because court found no reasonable person could find that the plaintiff had made reasonable efforts to preserve their secrecy).

employment contract will be enforced depends on the facts of each case,[102] and will generally depend upon the reasonableness of the agreement, as well as the employer's efforts to ensure confidentiality.[103] Virginia courts have consistently enforced nondisclosure agreements if they meet the following three-part test for reasonableness:

1. Is the restraint, from the standpoint of the employer, reasonable in the sense that it is no greater than is necessary to protect the employer in some legitimate business interest?
2. From the standpoint of the employee, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing his [or her] legitimate efforts to earn a livelihood?
3. Is the restraint reasonable from the standpoint of sound public policy?[104]

Misappropriation of a Trade Secret. The Virginia Uniform Trade Secrets Act defines *misappropriation* as:

- acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- disclosure or use of a trade secret of another without express or implied consent by a person who:
  - used improper means to acquire knowledge of the trade secret; or
  - at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:
    - derived from or through a person who had utilized improper means to acquire it;
    - acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use;
    - derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
    - acquired by accident or mistake.[105]

Improper means "theft, bribery, misrepresentation, breach of a duty or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means."[106] As the statute indicates, improper acquisition of a trade secret is flatly prohibited, regardless of whether the secret is used in direct competition with the rightful owner.[107] However, use of alleged trade secrets published on the internet by a third party does not constitute misappropriation.[108]

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[102] *Richardson v. Paxton Co.*, 127 S.E.2d 113, 116 (Va. 1962).

[103] *Eden Hannon & Co. v. Sumitomo Tr. & Banking Co.*, 914 F.2d 556, 560-61 (4th Cir. 1990) (protecting use of confidential business information in accordance with nondisclosure agreement).

[104] *Eden Hannon & Co.*, 914 F.2d at 561 (citing *Paramount Termite Control Co. v. Rector*, 380 S.E.2d 922, 924 (Va. 1989)).

[105] VA. CODE ANN. § 59.1-336.

[106] VA. CODE ANN. § 59.1-336.

[107] *Smithfield Ham & Prods. Co. v. Portion Pac, Inc.*, 905 F. Supp. 346, 350 (E.D. Va. 1995).

[108] *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1362, 1369 (E.D. Va. 1995).

In *Dionne v. Southeast Foam Converting & Packaging*, the Virginia Supreme Court enforced an injunction against a former employee who misappropriated the company's compressed expanded polystyrene product, in violation of his pledge of confidentiality.[109] The court held that it was sufficient for the employer to show that the product was generally unknown, and a unique product in the employer's sales area instead of in the national market. In addition, the court rejected the former employee's argument that he could not misappropriate something that he had assisted in developing, because he knew or should have known that the process belonged to the employer, and that he had a duty to maintain its secrecy. The court acknowledged that the injunction could be modified in the future, if at some point the product at issue could no longer be deemed a trade secret.

Remedies for Misappropriation. The Virginia Uniform Trade Secrets Act provides the exclusive remedy for misappropriation of trade secrets by improper means.[110] The statutory remedy supplants conflicting tort, restitutionary, and other law.[111]

Employers can protect their trade secrets through court-issued injunctions or actions for money damages. Proving damages can be difficult, however, so most often employers seek and obtain injunctive relief. Courts may enjoin actual or threatened misappropriation in an effort to prevent an employee from using confidential knowledge gained in the course of employment to the commercial disadvantage of the employer. Absent actual or threatened misappropriation, simple knowledge of trade secrets will not support an injunction.[112] The injunction generally terminates if the trade secret becomes known to good faith competitors.[113]

2.3(b)(v) *State Guidelines on Employee Inventions & Ideas*

Virginia does not have any statutory guidelines related to ownership of employee inventions and ideas.

3. DURING EMPLOYMENT

3.1 Posting, Notice & Record-Keeping Requirements

3.1(a) *Posting & Notification Requirements*

3.1(a)(i) *Federal Guidelines on Posting & Notification Requirements*

Several federal employment laws require that specific information be posted in the workplace. Posting requirements vary depending upon the law at issue. For example, employers with fewer than 50 employees are not covered by the Family and Medical Leave Act and, therefore, would not be subject to the law's posting requirements. Table 5 details the federal workplace posting and notice requirements.

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[109] 397 S.E.2d 110 (Va. 1990).

[110] *NSW Corp. v. Ferguson*, 49 Va. Cir. 456 (Va. Cir. Ct. 1999).

[111] 49 Va. Cir. at 457.

[112] *Motion Control Sys., Inc. v. East*, 546 S.E.2d 424, 426 (Va. 2001).

[113] *See* VA. CODE ANN. § 59.1-337(A) ("Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.").

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Employee Polygraph Protection Act (EPPA)	Employers must post and keep posted on their premises a notice explaining the EPPA.[114]
Equal Employment Opportunity (EEO) Act ("EEO is the Law" Poster)	Employers must post and keep posted in conspicuous places upon their premises, in an accessible format, a notice that describes the federal laws prohibiting discrimination in employment.[115]
Fair Labor Standards Act (FLSA)	Employers must post and keep posted a notice, summarizing employee rights under the FLSA, in conspicuous places in every establishment where employees subject to the FLSA are employed.[116]
Family & Medical Leave Act (FMLA)	Employers must conspicuously post, where employees are employed, a notice explaining the FMLA's provisions and providing information on filing complaints of violations.[117]
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	Farm labor contractors, agricultural employers, and agricultural associations that employ or house any migrant or seasonal agricultural worker must conspicuously post at the place of employment a poster setting forth the MSPA's rights and protections, including the right to request a written statement of the information described in 29 U.S.C. § 1821(a). The poster must be provided in Spanish or other language common to migrant or seasonal agricultural workers who are not fluent or literate in English.[118]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates must at all times display and make available to employees a poster explaining the conditions under which the special wage rate applies. Where an employer finds it inappropriate to post notice, directly providing the poster to its employees is sufficient.[119]

[114] 29 C.F.R. § 801.6. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/eppa.htm.

[115] 29 C.F.R. §§ 1601.30 (Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act), 1627.10 (Age Discrimination in Employment Act). This poster is available in English, Spanish, Arabic, and Chinese at https://www1.eeoc.gov/employers/poster.cfm.

[116] 29 C.F.R. § 516.4. This poster is available in English, Spanish, Chinese, Russian, Thai, Hmong, Vietnamese, Korean, Polish, and Haitian Creole at http://www.dol.gov/whd/regs/compliance/posters/flsa.htm.

[117] 29 C.F.R. § 825.300. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/fmla.htm.

[118] 29 C.F.R. §§ 500.75, 500.76. This poster is available in English, Spanish, Haitian Creole, Vietnamese, and Hmong at http://www.dol.gov/whd/regs/compliance/posters/mspaensp.htm.

[119] 29 C.F.R. § 525.14. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/disab.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Occupational Safety and Health Act ("the Fed-OSH Act")	Employers must post a notice or notices informing employees of the Fed-OSH Act's protections and obligations, and that for assistance and information employees should contact the employer or nearest U.S. Department of Labor office.[120]
Uniformed Service Employment and Reemployment Rights Act (USERRA)	Employers must provide notice about USERRA's rights, benefits, and obligations to all individuals entitled to such rights and benefits. Employers may provide notice by posting or by other means, such as by distributing or mailing the notice.[121]
In addition to the federal posters required for all employers, government contractors may be required to post the following posters.	
"EEO is the Law" Poster with the EEO is the Law Supplement	Employers subject to Executive Order No. 11246 must prominently post notice, where it can be readily seen by employees and applicants, explaining that discrimination in employment is prohibited on numerous grounds.[122] The second page includes reference to government contractors.
Annual EEO, Affirmative Action Statement	Government contractors covered by the Affirmative Action Program (AAP) requirements are required to post a separate EEO/AA Policy Statement (in addition to the required "EEO is the Law" Poster), which indicates the support of the employer's top U.S. official. This statement should be reaffirmed annually with the employer's AAP.[123]
Employee Rights Under the Davis-Bacon Act Poster	Employers performing work covered by the labor standards of the Davis-Bacon and Related Acts must prominently post notice, where accessible to employees, summarizing the protections of the law.[124]
Employee Rights Under the Service Contract or Walsh-Healey Public Contracts Acts Poster	Employers performing work covered by the McNamara-O'Hara Service Contract Act ("Service Contract Act") or the Walsh-Healey Public Contracts Act ("Walsh-Healey Act") must prominently post notice, where accessible to employees, summarizing all required compensation and other entitlements. To comply, employers may notify employees by

[120] 29 C.F.R § 1903.2. This poster is available in English, Spanish, Arabic, Chinese, Russian, Nepali, Thai, Hmong, Vietnamese, Korean, Polish, Portuguese, and Haitian Creole at https://www.osha.gov/Publications/poster.html.

[121] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

[122] 41 C.F.R. § 60-1.42; *see also* 41 C.F.R. § 60-741.5(a) (requiring all agencies and contractors to include an equal opportunity clause in contracts, in which the contractor agrees to post this notice). This poster is available at https://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm.

[123] 41 C.F.R. §§ 60-300.44, 60-741.44.

[124] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	attaching a notice to the contract, or may post the notice at the worksite.[125]
E-Verify Participation & Right to Work Posters	The Department of Homeland Security requires certain government contractors, under Executive Order Nos. 12989, 13286, and 13465, to post notice informing current and prospective employees of their rights and protections. Notices must be posted in a prominent place that is visible to prospective employees and all employees who are verified through the system.[126]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates authorized by the Service Contract Act or the Walsh-Healey Public Contracts Act must post notice, explaining the conditions under which the special minimum wages may be paid. Where an employer finds it inappropriate to post this notice, directly providing the poster to its employees is sufficient.[127]
Notification of Employee Rights Under Federal Labor Laws	Government contractors are required under Executive Order No. 13496 to post this notice in conspicuous locations and, if the employer posts notices to employees electronically, it must also make this poster available where it customarily places other electronic notices to employees about their jobs. Electronic posting cannot be used as a substitute for physical posting. Where a significant portion of the workforce is not proficient in English, the notice must be provided in the languages spoken by employees.[128]
Office of the Inspector General's Fraud Hotline Poster	Certain government contractors must prominently post notice, where accessible to employees, addressing fraud and how to report such misconduct.[129]
Paid Sick Leave Under Executive Order No. 13706	Certain government contractors must prominently post notice, where accessible to employees at the worksite, informing employees of their

[125] 29 C.F.R. § 4.6(e); 29 C.F.R. § 4.184. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/sca.htm.

[126] U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., *E-Verify Memorandum of Understanding for Employers*, *available at* https://www.e-verify.gov/sites/default/files/everify/memos/MOUforEVerifyEmployer.pdf. The poster is available at https://preview.e-verify.gov/sites/default/files/everify/posters/IER_RightToWorkPoster%20Eng_Es.pdf. According to the U.S. Citizenship and Immigration Services, this poster must be displayed in English and Spanish.

[127] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[128] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

[129] 48 C.F.R. §§ 3.1000 *et seq*. This poster is available at https://oig.hhs.gov/documents/root/243/OIG_Hotline_Ops_Poster_-_Grant__Contract_Fraud.pdf.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	right to earn and use paid sick leave. Notice may be provided electronically if customary to the employer.[130]
Pay Transparency Nondiscrimination Provision	Employers covered by Executive Order No. 11246 must either post a copy of this nondiscrimination provision in conspicuous places available to employees and applicants for employment, or post the provision electronically. Additionally, employers must distribute the nondiscrimination provision to their employees by incorporating it into their existing handbooks or manuals.[131] **Pay Period or Monthly Notice.** A contractor must inform an employee in writing of the amount of accrued paid sick leave no less than once each pay period or each month, whichever is shorter. Additionally, this information must be provided when employment ends and when an employee's accrued but unused paid sick leave is reinstated. Providing these notifications via a pay stub meets the compliance requirements of the executive order. **Pay Stub / Electronic.** A contractor's existing procedure for informing employees of available leave, such as notification accompanying each paycheck or an online system an employee can check at any time, may be used to satisfy or partially satisfy these requirements if it is written (including electronically, if the contractor customarily corresponds with or makes information available to its employees by electronic means).[132]
Worker Rights Under Executive Order Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	Employers that contract with the federal government under Executive Order Nos. 13658 or 14026 must prominently post notice, where accessible to employees, summarizing the applicable minimum wage rate and other required information.[133]

[130] 29 C.F.R. § 13.26. This poster is available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm. Additional resources on the sick leave requirement are available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm.

[131] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

[132] 29 C.F.R. § 13.5.

[133] 29 C.F.R. §§ 10.29, 23.290. The poster, referencing both Executive Orders, is available at https://www.dol.gov/whd/regs/compliance/posters/mw-contractors.htm.

3.1(a)(ii) *State Guidelines on Posting & Notification Requirements*

Table 6 details the state workplace posting and notice requirements. While local ordinances are generally excluded from this publication, some local ordinances may have posting requirements, especially in the minimum wage or paid leave areas. Local posting requirements may be discussed in the table below or in later sections, but the local ordinance coverage is not comprehensive.

Table 6. State Posting & Notice Requirements

Poster or Notice	Notes
Covenants not to Compete	Employers are prohibited from entering into, enforcing, or threatening to enforce a covenant not to compete with a low wage employee. A copy of the statute or an approved summary must be posted in the same location where other employee notices are posted.[134]
Human Trafficking	Employers that operate adult entertainment businesses and truck stops are obligated to post notice about human trafficking and information on a reporting hotline.[135]
Income Tax: Earned Income Tax Credit	All employers must post, where such notices are displayed, a poster provided by the Department of Social Services explaining to low-income employees that they may be entitled to earned income tax credits. While the statute requires the above poster only, the Virginia Department of Social Services requires both the above poster and the Federal Earned Income Tax Credit poster to be posted.[136]
Fair Employment Practices Documents: Disabilities Accommodation Notice	Employers with five or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year must post a notice informing employees of their rights to reasonable accommodation for disabilities in a conspicuous location. This information must also be included in any employee handbook. Moreover, employers must directly provide this notice to: (1) new employees upon commencement of their employment; and (2) any employee within 10 days of the employee's providing notice to the employer that the employee has a disability. The Office of Civil Rights of the Department of Law is expected to develop and publish the notice required.[137]
Pregnancy Discrimination Notice	Covered employers with 5 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year must post in a conspicuous location and include in any employee handbook information concerning: (1) the prohibition against unlawful

[134] VA. CODE ANN. § 40.1-28.7:7.

[135] VA. CODE ANN. § 40.1-11.3. This poster is available at https://www.doli.virginia.gov/wp-content/uploads/2018/03/Human-Trafficking-Poster-1.pdf.

[136] VA. CODE ANN. § 40.1-28.7:3. Both posters are available at https://doli.virginia.gov/downloadable_publications/.

[137] VA CODE ANN. § 2.2-3905.1.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	discrimination on the basis of pregnancy, childbirth, or related medical conditions including lactation; and, (2) an employee's right to reasonable accommodation for known limitations related to pregnancy, childbirth, or related medical conditions. This information also must be directly provided to: (1) new employees upon commencement of their employment; and, (2) any employee within 10 days of the employee's providing notice to the employer that they are pregnant.[138]
Public Works Contracts: Drug-Free Workplace	Public contractors required to maintain a drug-free workplace must post, in conspicuous places accessible to employees and applicants, a statement noting that the unlawful manufacture, sale, distribution, dispensation, possession, or use of an illegal substance is prohibited.[139]
Seizure First Aid Poster	Every employer with 25 or more employees in the state must physically post information on seizure first aid provided by the Department of Labor and Industry in a prominent position in the employer's workplace that is visible to employees. *Seizure first aid* means procedures to respond, attend, and provide comfort and safety to an individual suffering from a seizure. It does not include training to medically treat an individual suffering from a seizure. The poster must be at least 8.5 inches by 11 inches in size.[140]
Unemployment Compensation	Each employer subject to the unemployment insurance laws must post and maintain notice (VEC-B-29), where accessible to employees, informing employees of their eligibility for benefits and how to apply.[141]
Workers' Compensation: Notice Requirement	Under the Workers' Compensation Act, employers or workers' compensation insurers must provide notice to employees of their right to dispute a rejected workers' compensation benefits claim. If an employer denies an employee's request for workers' compensation benefits, the employer must include a notice, along with its letter to the employee denying benefits, stating that the employee has a right to dispute the claim denial through the Virginia Workers' Compensation Commission. The notice must include the address, telephone number, and website through which the employee may contact the Virginia Workers' Compensation Commission, along with the following text:

[138] VA. CODE ANN. § 2.2-3904.

[139] VA. CODE ANN. § 2.2-4312.

[140] VA. CODE ANN. § 40.1-11.4. This poster is available at https://www.doli.virginia.gov/wp-content/uploads/2022/06/SFA-Flier_VALabor_8.5x11.pdf.

[141] VA. CODE ANN. § 60.2-106; 16 VA. ADMIN. CODE § 30-50-80. This poster is available at https://doli.virginia.gov/downloadable_publications/. It is available in English at http://www.vec.virginia.gov/pdf/vecb29eng.pdf and in Spanish at http://www.vec.virginia.gov/pdf/vecb29sp.pdf.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	Employee right to dispute denial of workers' compensation benefits. If you disagree with this denial, you have the right to dispute the decision by filing a request for a hearing with the Virginia workers' compensation commission. It is your responsibility to dispute the decision as soon as practicable. The workers' compensation commission is a state agency responsible for making final decisions on disputed workers' compensation claims. However, such claim may be lost if you do not file it within the time limit provided by law, which is typically two years after the injury.[142]
Workers' Compensation: Poster Requirement	Every employer subject to the workers' compensation law must post and maintain conspicuous notice (Form 1) concerning employer and employee rights and responsibilities.[143]
Workplace Safety: Job Safety and Health Protection	All employers must post notice informing employees of their rights and responsibilities related to safety and health.[144]
Workplace Safety: Smoking Permitted and No Smoking Signs	Some employers are subject to smoking restrictions (*i.e.*, restaurants, health care facilities, retail establishments with at least 15,000 square feet) and must post conspicuous public notice to designate where smoking is permitted and/or prohibited.[145]

3.1(b) *Record-Keeping Requirements*

3.1(b)(i) *Federal Guidelines on Record Keeping*

Table 7 summarizes the federal record-keeping requirements.

[142] VA. CODE ANN. § 65.2-601.3.

[143] VA. CODE ANN. § 65.2-405; 16 VA. ADMIN. CODE § 30-50-80. This poster is available at https://doli.virginia.gov/downloadable_publications/. It is available in English at http://www.workcomp.virginia.gov/sites/default/files/documents/Employers-Workplace-Notice-Form-1.pdf.

[144] VA. CODE ANN. § 40.1-51.1; 16 VA. ADMIN. CODE § 25-60-40. This poster is available at https://doli.virginia.gov/downloadable_publications/. It is available in English at https://doli.virginia.gov/wp-content/uploads/2024/02/Job-Safety-Posters-English-August-2023.pdf and in Spanish at https://doli.virginia.gov/wp-content/uploads/2024/02/Job-Safety-Posters-Spanish-August-2023.pdf.

[145] VA. CODE ANN. §§ 15.2-2824 to 15.2-2827. Employers must create their own form to satisfy this requirement.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Age Discrimination in Employment Act (ADEA): Payroll Records	*Covered employers must maintain the following payroll or other records for each employee:* • employee's name, address, and date of birth; • occupation; • rate of pay; and • compensation earned each week.[146]	At least 3 years from the date of entry.
Age Discrimination in Employment Act (ADEA): Personnel Records	*Employers that maintain the following personnel records in the course of business are required by the ADEA to keep them for the specified period of time:* • job applications, resumes, or other forms of employment inquiry, including records pertaining to the refusal to hire any individual; • promotion, demotion, transfer, selection for training, recall, or discharge of any employee; • job orders submitted by the employer to an employment agency or labor organization; • test papers completed by applicants which disclose the results of any employment test considered by the employer; • results of any physical examination that was considered by the employer in connection with a personnel action; and • any advertisements or notices relating to job openings, promotions, training programs, or opportunities to work overtime.[147]	At least 1 year from the date of the personnel action to which any records relate.
Age Discrimination in Employment (ADEA): Benefit Plan Documents	*Employer must keep on file any:* • employee benefit plans, such as pension and insurance plans; and • copies of any seniority systems and merit systems in writing.[148]	For the full period the plan or system is in effect, and for at least 1 year after its termination.
Title VII and the Americans with Disabilities Act	*Employers must preserve any personnel or employment record made, including:* • requests for reasonable accommodation; • application forms submitted by applicants;	At least 1 year from the date the records were made, or

[146] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

[147] 29 C.F.R. § 1627.3(b).

[148] 29 C.F.R. § 1627.3(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
(ADA): Personnel Records	• other records having to do with hiring, promotion, demotion, transfer, lay-off, or termination; • rates of pay or other terms of compensation; and • selection for training or apprenticeship.[149]	from the date of the personnel action involved, whichever is later.
Title VII and the Americans with Disabilities Act (ADA): Complaints of Discrimination	*When a charge of discrimination has been filed or an action brought against the employer, it must:* • make and keep such records relevant to the determination of whether unlawful employment practices have been or are being committed, including personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • retain application forms or test papers completed by unsuccessful applicants or candidates for the position.[150]	Until final disposition of the charge or action (*i.e.*, until the statutory period for bringing an action has expired or, if an action has been brought, the date the litigation is terminated).
Title VII and the Americans with Disabilities Act (ADA): Other	An employer must keep and maintain its Employer Information Report (EEO-1).[151]	Most recent form must be retained for 1 year.
Employee Polygraph Protection Act (EPPA)	*Records pertaining to a polygraph test must be maintained for the specified time period including, but not limited to, the following:* • a statement of the reasons for conducting the examination; • a copy of the statement given to the examinee regarding the time and place of the examination and the examinee's right to consult with an attorney; • the notice to the examiner identifying the person to be examined; and • copies of opinions, reports, or other records given to the employer by the examiner.[152]	At least 3 years following the date on which the polygraph examination was conducted.

[149] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[150] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[151] 29 C.F.R. § 1602.7.

[152] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Employee Retirement Income Security Act (ERISA)	Employers that sponsor an ERISA-qualified plan must maintain records that provide in sufficient detail the information from which any plan description, report, or certified information filed under ERISA can be verified, explained, or checked for accuracy and completeness.[153]	At least 6 years after documents are filed or would have been filed but for an exemption.
Equal Pay Act	Covered employers must maintain the records required to be kept by employers under the Fair Labor Standards Act (29 C.F.R. part 516).[154]	3 years.
Equal Pay Act: Other	*Covered employers must maintain any additional records made in the regular course of business relating to:* • payment of wages; • wage rates; • job evaluations; • job descriptions; • merit and seniority systems; • collective bargaining agreements; and • other matters which describe any pay differentials between the sexes.[155]	At least 2 years.
Fair Labor Standards Act (FLSA): Payroll Records	*Employers must maintain the following records with respect to each employee subject to the minimum wage and/or overtime provisions of the FLSA:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth, if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • regular hourly rate of pay for any workweek in which overtime compensation is due; • basis on which wages are paid (pay interval); • amount and nature of each payment excluded from the employee's regular rate;	3 years from the last day of entry.

[153] 29 U.S.C. § 1027.

[154] 29 C.F.R. § 1620.32(a).

[155] 29 C.F.R. § 1620.32(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• hours worked each workday and total hours worked each workweek; • total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation; • total premium pay for overtime hours; • total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments; • total wages paid each pay period; • date of payment and the pay period covered by the payment; • records of retroactive payment of wages, including the amount of such payment to each employee, the period covered by the payment, and the date of the payment; and • for employees working on a fixed schedule, the schedule of daily and weekly hours the employee normally works (instead of hours worked each day and each workweek).[156] The record should also indicate for each week whether the employee adhered to the schedule and, if not, show the exact number of hours worked each day each week.	
Fair Labor Standards Act (FLSA): White Collar Exemptions	*For bona fide executive, administrative, and professional employees, and outside sales employees (e.g., white collar employees) the following information must be maintained:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • total wages paid each pay period; • date of payment and the pay period covered by the payment; and • basis on which wages are paid in sufficient detail to permit calculation for each pay period of the	3 years from the last day of entry.

[156] 29 C.F.R. §§ 516.2, 516.28, and 516.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	employee's total remuneration for employment including fringe benefits and prerequisites.[157]	
Fair Labor Standards Act (FLSA): Agreements & Other Records	*In addition to payroll information, employers must preserve agreements and other records, including:* • collective bargaining agreements and any amendments or additions; • individual employment contracts or, if not in writing, written memorandum summarizing the terms; • written agreements or memoranda summarizing special compensation arrangements under FLSA sections 7(f) or 7(j); • certain plans and trusts under FLSA section 7(e); • certificates and notices listed or named in the FLSA; and • sales and purchase records.[158]	At least 3 years from the last effective date.
Fair Labor Standards Act (FLSA): Other Records	*In addition to other FLSA requirements, employers must preserve supplemental records, including:* • basic time and earning cards or sheets; • wage rate tables; • order, shipping, and billing records; and • records of additions to or deductions from wages.[159]	At least 2 years from the date of last entry.
Family and Medical Leave Act (FMLA)	*Covered employers must make, keep, and maintain records pertaining to their compliance with the FMLA, including:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours per pay period; • additions to or deductions from wages and total compensation paid; • dates FMLA leave is taken by FMLA-eligible employees (leave must be designated in records as FMLA leave, and leave so designated may not include leave required under state law or an employer plan not covered by FMLA); • if FMLA leave is taken in increments of less than one full day, the hours of the leave;	At least 3 years.

[157] 29 C.F.R. §§ 516.3, 516.5.

[158] 29 C.F.R. § 516.5.

[159] 29 C.F.R. § 516.6.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• copies of employee notices of leave furnished to the employer under the FMLA, if in writing; • copies of all general and specific notices given to employees in accordance with the FMLA; • any documents that describe employee benefits or employer policies and practices regarding the taking of paid and unpaid leave; • premium payments of employee benefits; and • records of any dispute between the employer and an employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and the disagreement. *Covered employers with no eligible employees must only maintain the following records:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours worked per pay period; • additions to or deductions from wages; and • total compensation paid. *Covered employers in a joint employment situation must keep all the records required in the first series with respect to any primary employees, and must keep the records required by the second series with respect to any secondary employees.* *Also, if an FMLA-eligible employee is not subject to the FLSA record-keeping requirements for minimum wage and overtime purposes (i.e., not covered by, or exempt from FLSA) an employer does not need to keep a record of actual hours worked, provided that:* • FMLA eligibility is presumed for any employee employed at least 12 months; and • with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written, maintained record.	

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	Medical records also must be retained. Specifically, records and documents relating to certifications, re-certifications, or medical histories of employees or employees' family members, created for purposes of FMLA, must be maintained as confidential medical records in separate files/records from the usual personnel files. If the ADA is also applicable, such records must be maintained in conformance with ADA-confidentially requirements (subject to exceptions).[160]	
Federal Insurance Contributions Act (FICA)	*Employers must keep FICA records, including:* • copies of any return, schedule, or other document relating to the tax; • records of all remuneration (cash or otherwise) paid to employees for employment services. The records must show with respect to each employee receiving such remuneration: ▪ name, address, and account number of the employee and additional information when the employee does not provide a Social Security card; ▪ total amount and date of each payment of remuneration (including any sum withheld as tax or for any other reason) and the period of services covered by such payment; ▪ amount of each such remuneration payment that constitutes wages subject to tax; ▪ amount of employee tax, or any amount equivalent to employee tax, collected with respect to such payment, and, if collected at a time other than the time such payment was made, the date collected; and ▪ if the total remuneration payment and the amount thereof which is taxable are not equal, the reason for this; • the details of each adjustment or settlement of taxes under FICA; and • records of all remuneration in the form of tips received by employees, employee statements of tips under section 6053(a) (unless otherwise maintained), and	At least 4 years after the date the tax is due or paid, whichever is later.

[160] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	copies of employer statements furnished to employees under section 6053(b).[161]	
Immigration	Employers must retain all completed Form I-9s.[162]	3 years after the date of hire or 1 year following the termination of employment, whichever is later.
Income Tax: Accounting Records	*Any taxpayer required to file an income tax return must maintain accounting records that will enable the filing of tax returns correctly stating taxable income each year, including:* • regular books of account; and • other records and data that may be necessary to support the entries on the return.[163]	Required to be maintained for "so long as the contents [of the records] may become material in the administration of any internal revenue law;" this could be as long as 15 years in some cases.
Income Tax: Employee Payment Records	*Employers are required to maintain records reflecting all remuneration paid to each employee, including:* • employee's name, address, account number; • total amount, and date of each payment; • the period of services covered by the payment; • the amount of remuneration that constitutes wages subject to withholding; • the amount of tax collected; • an explanation for any discrepancy between total remuneration and taxable income; • the fair market value and date of each payment of noncash remuneration for services performed as a retail commissioned salesman; and	4 years after the return is due or the tax is paid, whichever is later.

[161] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[162] 8 C.F.R. § 274a.2.

[163] Internal Rev. Code § 3402; 26 C.F.R. § 1.6001-1.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• other supporting documents relating to each employee's individual tax status.[164]	
Income Tax: W-4 Forms	Employers must retain all completed Form W-4s.[165]	As long as it is in effect and at least 4 years thereafter.
Unemployment Insurance	*Employers are required to maintain all relevant records under the Federal Unemployment Tax Act, including:* • total amount of remuneration paid to employees during the calendar year for services performed; • amount of such remuneration which constitutes wages subject to taxation; • amount of contributions paid into state unemployment funds; • information required to be shown on the tax return and the extent to which the employer is liable for the tax; • an explanation for any discrepancy between total remuneration paid and the amount subject to tax; and • the dates in each calendar quarter on which each employee performed services not in the course of the employer's trade or business, and the amount of the cash remuneration paid for those services.[166]	At least 4 years after the later of the date the tax is due or paid for the period covered by the return.
Workplace Safety / the Fed-OSH Act: Exposure Records	*Employers must preserve and retain employee exposure records, including:* • environmental monitoring or measuring; • biological monitoring results which directly assess the absorption of a toxic substances or harmful physical agent by body specimens; and • Material Safety Data Sheets (MSDSs), or in the absence of these documents, a chemical inventory or other record reveling the identity of a toxic substances or harmful physical agent and where and when the substance or agent was used. *Exceptions to this requirement include:*	At least 30 years.

[164] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[165] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[166] 26 C.F.R. § 31.6001-4.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• background data to workplace monitoring need only be retained for 1 year provided that the sampling results, collection methodology, analytic methods used, and a summary of other background data is maintained for 30 years; • MSDSs need not be retained for any specified time so long as some record of the identity of the substance, where it was used and when it was used is retained for at least 30 years; and • biological monitoring results designated as exposure records by a specific Fed-OSH Act standard should be retained as required by the specific standard.[167]	
Workplace Safety / the Fed-OSH Act: Medical Records	*Employers must preserve and retain "employee medical records," including:* • medical and employment questionnaires or histories; • results of medical examinations; • medical opinions, diagnoses, progress notes, and recommendations; • descriptions of treatments and prescriptions; and • employee medical complaints. *"Employee medical record" does not include:* • physical specimens; • records of health insurance claims maintained separately from employer's medical program; • records created solely in preparation for litigation that are privileged from discovery; • records concerning voluntary employee assistance programs, if maintained separately from the employer's medical program and its records; and • first aid records of one-time treatment which do not involve medical treatment, loss of consciousness, restriction of work, or transfer to another job, if made on-site by a nonphysician and maintained separately from the employer's medical program and its records.[168]	Duration of employment plus 30 years.
Workplace Safety: Analyses	*Employers must preserve and retain analyses using medical and exposure records*, including any compilation of data, or	At least 30 years.

[167] 29 C.F.R. § 1910.1020(d).

[168] 29 C.F.R. § 1910.1020(d).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Using Medical and Exposure Records	other study based on information collected from individual employee exposure or medical records, or information collected from health insurance claim records, provided that the analysis has been provided to the employer or no further work is being done on the analysis.[169]	
Workplace Safety: Injuries and Illnesses	*Employers must preserve and retain records of employee injuries and illnesses, including:* • OSHA 300 Log; • the privacy case list (if one exists); • the Annual Summary; • OSHA 301 Incident Report; and • old 200 and 101 Forms.[170]	5 years following the end of the calendar year that the record covers.
Additional record-keeping requirements apply to government contractors. The list below, while nonexhaustive, highlights some of these obligations.		
Affirmative Action Programs (AAP)	*Contractors required to develop written affirmative action programs must maintain:* • current AAP and documentation of good faith effort; and • AAP for the immediately preceding AAP year and documentation of good faith effort.[171]	Immediately preceding AAP year.
Equal Employment Opportunity: Personnel & Employment Records	*Government contractors covered by Executive Order No. 11246 and those required to provide affirmative action to persons with disabilities and/or disabled veterans and veterans of the Vietnam Era must retain the following records:* • records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; • other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes; and • any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered the individual for a particular	3 years recommended; regulations state "not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later." If the contractor has fewer than 150 employees

[169] 29 C.F.R. § 1910.1020(d).

[170] 29 C.F.R. §§ 1904.33, 1904.44.

[171] 41 C.F.R. § 60-1.12(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	position, such as on-line resumes or internal resume databases, records identifying job seekers contacted regarding their interest in a particular position, regardless of whether the individual qualifies as an internet applicant under 41 C.F.R. § 60–1.3, tests and test results, and interview notes; ▪ for purposes of record keeping with respect to internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search; ▪ for purposes of record keeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor). *Additionally, for any record the contractor maintains pursuant to 41 C.F.R. § 60-1.12, it must be able to identify:* • gender, race, and ethnicity of each employee; and • where possible, the gender, race, and ethnicity of each applicant or internet applicant.[172]	or does not have a contract of at least $150,000, the minimum retention period is one year from the date of making the record or the personnel action, whichever occurs later.
Equal Employment Opportunity: Complaints of Discrimination	*Where a complaint of discrimination has been filed, an enforcement action commenced, or a compliance review initiated, employers must maintain:* • personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • application forms or test papers completed by unsuccessful applicants and candidates for the same	Until final disposition of the complaint, compliance review or action.

[172] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	position as the aggrieved person applied and was rejected.[173]	
Minimum Wage Under Executive Orders Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	*Covered contractors and subcontractors performing work must maintain for each worker:* • name, address, and Social Security number; • occupation(s) or classification(s); • rate or rates of wages paid; • number of daily and weekly hours worked; • any deductions made; and • total wages paid. These records must be available for inspection and transcription by authorized representatives of the Wage and Hour Division (WHD) of the U.S. Department of Labor. The contractor must also permit authorized representatives of the WHD to conduct interviews with workers at the worksite during normal working hours.[174]	3 years.
Paid Sick Leave Under Executive Order No. 13706	*Contractors and subcontractors performing work subject to Executive Order No. 13706 must keep the following records:* • employee's name, address, and Social Security number; • employee's occupation(s) or classification(s); • rate(s) of wages paid (including all pay and benefits provided); • number of daily and weekly hours worked; • any deductions made; • total wages paid (including all pay and benefits provided) each pay period; • a copy of notifications to employees of the amount of accrued paid sick leave; • a copy of employees' requests to use paid sick leave (if in writing) or (if not in writing) any other records reflecting such employee requests; • dates and amounts of paid sick leave used by employees (unless a contractor's paid time off policy satisfies the EO's requirements, leave must be designated in records as paid sick leave pursuant to the EO);	During the course of the covered contract as well as after the end of the contract.

[173] 41 C.F.R. §§ 60-1.12, 60-741.80.

[174] 29 C.F.R. § 23.260.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• a copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests; • any records relating to the certification and documentation a contractor may require an employee to provide, including copies of any certification or documentation provided by an employee; • any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave; • the relevant covered contract; • the regular pay and benefits provided to an employee for each use of paid sick leave; and • any financial payment made for unused paid sick leave upon a separation from employment intended to relieve a contractor from its reinstatement obligation.[175]	
Davis-Bacon Act	*Davis-Bacon Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • hourly rates of wages paid (including rates of contributions or costs anticipated for *bona fide* fringe benefits or cash equivalents); • daily and weekly number of hours worked; and • deductions made and actual wages paid. *Contractors employing apprentices or trainees under approved programs must maintain written evidence of:* • registration of the apprenticeship programs; • certification of trainee programs; • the registration of the apprentices and trainees; • the ratios and wage rates prescribed in the program; and • worker or employee employed in conjunction with the project.[176]	At least 3 years after the work.

[175] Exec. Order No. 13706 (codified at 29 C.F.R. § 13.5).

[176] 29 C.F.R. § 5.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Service Contract Act	*Service Contract Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • rates of wage; • fringe benefits; • total daily and weekly compensation; • the number of daily and weekly hours worked; • any deductions, rebates, or refunds from daily or weekly compensation; • list of wages and benefits for employees not included in the wage determination for the contract; • any list of the predecessor contractor's employees which was furnished to the contractor by regulation; and • a copy of the contract.[177]	At least 3 years from the completion of the work records containing the information.
Walsh-Healey Act	*Walsh-Healey Act supply contractors must keep the following records:* • wage and hour records for covered employees showing wage rate, amount paid in each pay period, hours worked each day and week; • the period in which each employee was engaged on a government contract and the contract number; • name, address, sex, and occupation; • date of birth of each employee under 19 years of age; and • a certificate of age for employees under 19 years of age.[178]	At least 3 years from the last date of entry.

3.1(b)(ii) *State Guidelines on Record Keeping*

Table 8 summarizes the state record-keeping requirements.

[177] 29 C.F.R. § 4.6.

[178] 41 C.F.R. § 50-201.501.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Income Tax	All taxpayers must retain all records and documents necessary to substantiate the information contained on a tax return.[179]	3 years from the required date for filing, or, if an extension was granted, 3 years from the extended date.
Unemployment Compensation	*Each employing unit with one or more employees must maintain records for each worker, including:* • full legal name and Social Security number; • states(s) in which services are performed. (If some services performed outside of Virginia are not incidental to the services within Virginia, the base of operations should be listed or, if none, the employee's residence.); • date of hire, rehire, or return to work; • date worked ceased and the reason for the cessation; • scheduled hours (except for employees without a fixed schedule of hours); • wages earned in any week by a partially employed individual, whether any week was in fact less than full-time work, and time lost by each such worker and the reason therefor; • total wages in each pay period, and total wages payable for all pay periods ending each pay period, showing separately: (1) money wages (including tips and severance pay); and (2) the cash value of other remuneration; • any special payments for service other than those rendered exclusively in a given quarter such as annual bonuses, gifts, etc., showing separately money payments, other remuneration, and the nature of the payments; • amounts paid each worker as advancement, allowance, or reimbursement for business expenses, date of payment, and amounts of expenditures actually incurred and accounted for by the employee; and • location in which worker's services are performed and dates services were performed outside of the U.S.	4 years from the date of payment of the tax based on the record.

[179] VA. CODE ANN. § 58.1-102; 23 VA. ADMIN. CODE § 10-20-90.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	Upon request, employers must provide the commission with: • federal W2 and 1099 forms; • federal and state employment and income tax returns; and • any other records relevant to ensuring that wages were accurately reported and taxes or refunds correctly computed.[180]	
Workers' Compensation	*Employers must keep a record of all injuries or deaths of employees that occur in the course of employment, including:* • name, nature, and location of the business of the employer; • name, age, and sex of the injured employee; • wages and occupation of the injured employee; • date and hour of the accident causing the injury; and • nature and cause of injury.[181]	No time frame specified.
Workplace Safety	Virginia employers are required to comply with Fed-OSHA's record-keeping requirements located at 29 C.F.R. 1904 *et seq*.[182]	See the federal requirements (Table 7).

3.1(c) *Personnel Files*

3.1(c)(i) *Federal Guidelines on Personnel Files*

Federal law does not address access to personnel files for private-sector employees.

3.1(c)(ii) *State Guidelines on Personnel Files*

Employers must provide copies of certain information to employees upon written request. A current or former employee, or the employee's attorney, may make a written request to receive a copy of all records of papers retained by the employer in any format that reflect:

- the employee's dates of employment;
- the employee's wages or salary;
- the employee's job description and job title; and
- any injuries sustained by the employee during the course of employment.

[180] VA. CODE ANN. § 60.2-114; 16 VA. ADMIN. CODE § 5-32-10.

[181] VA. CODE ANN. § 65.2-900.

[182] 16 VA. ADMIN. CODE § 25-85-1904.

An employer may charge a reasonable fee for copying if the records are kept in paper or hard copy format. If the records are kept in electronic format, the employer may charge a reasonable fee for the electronic records.

Employers must provide the records within 30 days of receipt of the request. If the employer cannot do so within 30 days, it must notify the requester in writing of the reason for the delay, and must comply with the request within 30 days of the written notice. If the employer fails to comply, an employee or employee's attorney may subpoena the records. In the process of doing so, the court may award damages for all expenses incurred by the employee to obtain the records, including a refund of fees, court costs, and reasonable attorneys' fees.

The law provides certain exceptions for record disclosure when the life or physical safety of an employee or another person is an issue.[183]

3.2 Privacy Issues for Employees

3.2(a) *Background Screening of Current Employees*

3.2(a)(i) *Federal Guidelines on Background Screening of Current Employees*

For information on federal law related to background screening of current employees, see **1.3**.

3.2(a)(ii) *State Guidelines on Background Screening of Current Employees*

For information on state law related to background screening of current employees, see **1.3**.

3.2(b) *Drug & Alcohol Testing of Current Employees*

3.2(b)(i) *Federal Guidelines on Drug & Alcohol Testing of Current Employees*

For information on federal laws requiring drug testing of current employees, see **1.3(e)(i)**.

3.2(b)(ii) *State Guidelines on Drug & Alcohol Testing of Current Employees*

For information on state law related to drug testing of current employees, see **1.3(e)(ii)**.

3.2(c) *Marijuana Laws*

3.2(c)(i) *Federal Guidelines on Marijuana*

Under federal law, it is illegal to possess or use marijuana.[184]

3.2(c)(ii) *State Guidelines on Marijuana*

Employers cannot discharge, discipline, or discriminate against an employee who lawfully uses cannabis oil per a practitioner's valid written certification for treatment or to eliminate the symptoms of the employee's diagnosed condition or disease. This does not apply to employees that are law enforcement officers.[185] Actual or prospective defense industrial base sector employers need not hire or retain any applicant or employee who tests positive for tetrahydrocannabinol (THC) in excess of 50 ng/ml for a urine test or 10 pg/mg for a hair test. Employers can take adverse employment action against an employee for

[183] VA. CODE ANN. § 8.01-413.1.

[184] 21 U.S.C. §§ 811-12, 841 *et seq*.

[185] VA. CODE ANN. § 40.1-27.4; *see also* VA. CODE ANN. § 54.1-3408.3.

work impairment caused by cannabis oil use during work hours, and can prohibit cannabis oil possession during work hours. Finally, under the law, employers need not commit any act that would cause them to violate federal law or would result in the loss of a federal contract or federal funding.

Virginia also permits marijuana for recreational purposes. Currently, other than provisions on background checks, there are no typical labor and employment provisions one might expect with such a law. Notwithstanding permitting recreational marijuana use, individuals cannot use or consume marijuana or marijuana products while driving, or while being a passenger in, a motor vehicle upon a public highway, or consume marijuana or marijuana products in any public place.[186]

3.2(d) *Data Security Breach*

3.2(d)(i) *Federal Data Security Breach Guidelines*

Federal law does not contain a data security breach notification statute. However, of interest to employers that provide identity theft protection services to individuals affected by a data security breach, whether voluntarily or as required by state law:

- An employer providing identity protection services to an employee whose personal information may have been compromised due to a data security breach is not required to include the value of the identity protection services in the employee's gross income and wages.
- An individual whose personal information may have been compromised in a data breach is not required to include in their gross income the value of the identity protection services.
- The value of the provided identity theft protection services is not required to be reported on an information return (such as Form W-2 or Form 1099-MISC) filed with respect to affected employees.[187]

The tax relief provisions above do not apply to:

- cash provided in lieu of identity protection services;
- identity protection services provided for reasons other than as a result of a data breach, such as identity protection services received in connection with an employee's compensation benefit package; or
- proceeds received under an identity theft insurance policy.[188]

3.2(d)(ii) *State Data Security Breach Guidelines*

Virginia's security breach notification law requires that when a covered entity has a reasonable belief that personal information was accessed and acquired by an unauthorized person, the entity must notify the affected individual and the Office of the Attorney General without unreasonable delay.[189] The statute

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[186] VA. CODE ANN. §§ 4.1-1107(A)-(B).

[187] I.R.S. Announcement 2015-22, Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims (Aug. 14, 2015), available at https://www.irs.gov/pub/irs-drop/a-15-22.pdf.

[188] I.R.S. Announcement 2015-22, Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims (Aug. 14, 2015).

[189] VA. CODE ANN. § 18.2-186.6.

requires notice only if there is a reasonable belief that the breach will cause identity theft or other fraud.[190] If an employer becomes aware that computerized data containing the personal information of its employees has been compromised, the employer must take care to provide proper notice of the security breach to the affected employees. Additionally, an employer that owns or licenses computerized data relating to income tax must notify the Office of the Attorney General about certain breaches.[191]

Covered Entities & Information. A covered entity is an entity that conducts business in Virginia and owns or licenses computerized data containing personal information.

Additionally, the following entities are deemed in compliance with the statute:

- any entity that is subject to and complies with Title V of the Gramm-Leach-Bliley Act;
- any entity that complies with the notification requirements or security breach procedures of their primary or functional federal regulator; and
- a covered entity that maintains and complies with a notification procedure as part of its own information security policy for the treatment of personal information, as long as that policy affords the same or greater protection to the affected individuals as the statute.[192]

The statute defines *personal information* as unredacted or unencrypted information containing the first name or first initial and last name, in combination with any of the following identifiers:

- Social Security number;
- driver's license or state identification card number;
- financial account number, or credit or debit card number, in combination with any required security code or password;
- passport number; or
- military identification number.[193]

Content & Form of Notice. Notice to affected individuals must include a description of the following:

- the incident in general terms;
- the type of personal information that was subject to the unauthorized access and acquisition;
- the general acts of the business or government agency to protect the personal information from further unauthorized access;
- a telephone number that the person may call for further information and assistance, if one exists; and

[190] VA. CODE ANN. § 18.2-186.6(B).

[191] VA. CODE ANN. § 18.2-186.6(M).

[192] VA. CODE ANN. § 18.2-186.6.

[193] VA. CODE ANN. § 18.2-186.6(A).

- advice that directs the person to remain vigilant by reviewing account statements and monitoring free credit reports.[194]

Notice may be in one of the following formats:

- written notice;
- electronic notice;
- telephonic notice; or
- substitute notice, if:
  - the covered entity demonstrates that:
    - the cost of providing notice would exceed $50,000;
    - the affected class of persons to be notified exceeds 100,000; or
    - the covered entity does not have sufficient contact information.[195]

Substitute notice must consist of all of the following:

- email notice, if the covered entity has an email address for the affected resident;
- conspicuous posting of the notice on the website of the covered entity, if the covered entity maintains a website; and
- notification by statewide media.[196]

Notice required by this law will not be considered a debt communication as defined by the federal Fair Debt Collection Practices Act.

Timing of Notice. Notice must be given without unreasonable delay. However, notification may be delayed if:

- A law enforcement agency determines that the notification will impede a criminal investigation.
- A covered entity needs time to determine the scope of the breach.
- A covered entity needs time to restore the reasonable integrity of the data system.[197]

3.2(e) *Other State Privacy Laws*

Virginia prohibits employers from using an employee's Social Security number or any derivative thereof as that employee's identification number. Moreover, an employer cannot include an employee's Social Security number on any identification card or badge, access card or badge, or any other similar card or badge issued to employees. An employer that knowingly violates these provisions is subject to a civil penalty of no more than $100 per violation. If an employer receives notice from the state alleging violations of this law, the employer has 15 days to request an informal conference about the violation

[194] VA. CODE ANN. § 18.2-186.6(A).

[195] VA. CODE ANN. § 18.2-186.6(A).

[196] VA. CODE ANN. § 18.2-186.6(A).

[197] VA. CODE ANN. § 18.2-186.6(B).

with the Commissioner of Labor and Industry before a penalty is assessed. The amount of the penalty will be determined with consideration of the size of the employer's business and the gravity of the violation.[198]

3.3 Minimum Wage & Overtime

3.3(a) *Federal Guidelines on Minimum Wage & Overtime*

The primary source of federal wage and hour regulation is the Fair Labor Standards Act (FLSA). The FLSA establishes minimum wage, overtime, and child labor standards for covered employers. The FLSA applies to businesses that have: (1) annual gross revenue exceeding $500,000; and (2) employees engaged in commerce or in the production of goods for commerce, or employees that handle, sell, or otherwise work on goods or material that have been moved in or produced for commerce. For more information on this topic, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

As a general rule, federal wage and hour laws do not preempt state laws.[199] Thus, an employer must determine whether the FLSA or state law imposes a more stringent minimum wage, overtime, or child labor obligation and, if so, apply the more stringent of the two standards. If an employee is exempt from either federal or state law, but not both, then the employee must be paid for work in accordance with whichever law applies.

3.3(a)(i) *Federal Minimum Wage Obligations*

The current federal minimum wage is $7.25 per hour for most nonexempt employees.[200]

Tipped employees are paid differently. If an employee earns sufficient tips, an employer may take a maximum tip credit of up to $5.12 per hour. Therefore, the minimum cash wage that a tipped employee must be paid is $2.13 per hour. Note that if an employee does not make $5.12 in tips per hour, an employer must make up the difference between the wage actually made and the federal minimum wage of $7.25 per hour. An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips actually received by the employee.[201]

An employer cannot keep tips received by employees for any purpose, including allowing managers or supervisors to keep a portion of employees' tips, regardless of whether the employer takes a tip credit.[202]

3.3(a)(ii) *Federal Overtime Obligations*

Nonexempt employees must be paid one-and-a-half times their regular rate of pay for all hours worked over 40 in a workweek.[203] For more information on exemptions to the federal minimum wage and/or overtime obligations, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

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198 VA. CODE ANN. § 40.1-28.7:10.

199 29 U.S.C. § 218(a).

200 29 U.S.C. § 206.

201 29 U.S.C. §§ 203, 206.

202 29 U.S.C. § 3(m)(2)(B).

203 29 U.S.C. § 207.

3.3(b) *State Guidelines on Minimum Wage Obligations*

3.3(b)(i) *State Minimum Wage*

The Virginia Minimum Wage Act (MWA)[204] requires that employers pay employees at least the federal or state minimum wage, whichever is greater. Currently, the minimum wage is $12.00 per hour.[205] Although a $13.50 and $15.00 per hour minimum wage had been provisionally approved for 2025 and 2026, respectively, because the state did not reenact those increase by July 1, 2024, the state labor department will set the minimum wage rates for those years, *e.g.*, on January 1, 2025, the minimum wage will increase to $12.41 per hour. Beginning on January 1, 2027, and on each subsequent January 1, the state labor department must adjust the minimum wage based on changes to the Consumer Price Index; in no case can the adjustment be less than zero.

3.3(b)(ii) *Tipped Employees*

Employers of tipped employees may take a maximum tip credit toward their minimum wage obligations equal to the difference between the required cash wage under the FLSA ($2.13 per hour) and the Virginia minimum wage,[206] provided that the tipped employee earns at least that amount in tips.[207]

In deciding the portion of a tipped employee's wages that are required to be paid by the employer, the statute provides that the employer is to make the determination of the amount attributed to tips. However, an employee may rebut that determination with clear and convincing evidence showing that the actual amount of tips received was less than the amount the employer determined.[208]

An employer cannot classify an individual as a tipped employee if the individual is prohibited by applicable federal or state law or regulation from soliciting tips, and a *tipped employee* will be defined as an employee who, in the course of employment, customarily and regularly receives tips totaling more than $30 each month from persons other than the employee's employer.[209]

3.3(b)(iii) *Minimum Wage Exceptions & Rates Applicable to Specific Groups*

There are more than 50 exceptions to the MWA applicable to farm workers, domestic servants, persons engaged in educational, charitable, religious, or nonprofit organizations where there is no employer-employee relationship, golf course caddies, traveling or outside salespeople on commission, and taxicab drivers and operators.[210] However, as of July 1, 2020, the number, and scope, of the exemptions changed. For example, there is no longer an exemption for employees whose employment the FLSA covers. As a result, because the MWA does not contain a standalone exemption for certain FLSA-exempt white collar employees – *i.e.*, bona fide executive, administrative, professional employees – this means such employees must be paid at least the state minimum wage for each hour they work in a workweek.

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[204] VA. CODE ANN. §§ 40.1-28.8 to 40.1-28.12.

[205] VA. CODE ANN. § 40.1-28.10.

[206] 29 U.S.C. § 203(m).

[207] 29 U.S.C. § 203(m).

[208] VA. CODE ANN. § 40.1-28.9(B).

[209] VA. CODE ANN. § 40.1-28.9(A)-(B).

[210] VA. CODE ANN. § 40.1-28.9(A).

In addition, pursuant to their express terms, Virginia's primary wage and hour statutes (the Virginia Minimum Wage Act and Virginia Wage Payment Act) apply only to "employees."[211] Their requirements do not apply to individuals who are properly classified as independent contractors. The Division of Labor and Employment Law has agreed with the U.S. Internal Revenue Service's (IRS) methodology for determining an individual's employment status and will accept IRS rulings on that question.[212]

3.3(c) *State Guidelines on Overtime Obligations*

Before July 1, 2021, Virginia did not have a separate overtime provision, so payment of overtime in Virginia until that time was regulated by the FLSA, which establishes a 40-hour overtime standard for covered employees. Similarly, effective July 1, 2022, Virginia overtime law will apply only to employees of derivative air carriers.[213]

From July 1, 2021 through June 30, 2022, similar to the federal overtime requirements, for all hours worked in excess of 40 hours in a workweek, Virginia employers must pay all covered employees not less than one and one-half times their regular rate of pay, pursuant to 29 U.S.C. § 207.[214] For employees paid on an hourly basis, the regular rate is the hourly rate of pay plus any other non-overtime wages paid or allocated for that workweek, excluding any amounts that are excluded from the regular rate by the federal Fair Labor Standards Act, divided by the total number of hours worked in that workweek.[215] For employees paid on a salary or other regular basis, the regular rate is one-fortieth of all wages paid for that workweek.[216] *Workweek* means a fixed and regularly occurring period of 168 hours or seven consecutive 24-hour period, which need not coincide with the calendar week and may begin on any day and at any hour selected by the employer.[217]

3.3(d) *State Guidelines on Overtime Exemptions*

Effective July 1, 2022, Virginia's overtime law will apply only to employees of derivative air carriers.[218] From July 1, 2021 through June 30, 2022, both the FLSA and the Virginia overtime law provide limited exemptions to overtime obligations. Virginia incorporates the federal overtime exemptions under—*e.g.*, executive, administrative, professional, outside sales, hourly computer, and highly compensated employees, as well as employees whom the U.S. Secretary of Transportation has the power to establish qualifications and maximum hours of service and drivers or driver's helpers making local deliveries who are compensated on a trip-rate basis or other delivery payment plan if the U.S. Secretary of Labor finds the plan has the general purpose and effect of reducing hours worked by employees to, or below, 40 hours per week.[219]

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[211] VA. CODE ANN. § 40.1-28.9(A), 40.1-28.10, 20.1-29.

[212] Virginia Dep't of Labor and Indus., Div. of Labor and Emp't Law, FIELD OPERATIONS MANUAL, Ch. 10 Payment of Wage at § 13.00(A) (Jan. 2009), *available at* https://townhall.virginia.gov/L/ViewGDoc.cfm?gdid=5539.

[213] VA. CODE ANN. § 40.1-29.3.

[214] VA. CODE ANN. § 40.1-29.2(B).

[215] VA. CODE ANN. § 40.1-29.2(B)(1).

[216] VA. CODE ANN. § 40.1-29.2(B)(2).

[217] VA. CODE ANN. § 40.1-29.2(A).

[218] VA. CODE ANN. § 40.1-29.3.

[219] VA. CODE ANN. § 40.1-29.2(D).

There remains an open question as to whether Virginia's overtime law contains a commissioned sales employee exemption. Specifically, the July 2021 overtime law provides that "[f]or any hours worked by an employee in excess of 40 hours in any one workweek, an employer shall pay such employee an overtime premium at a rate not less than one and one-half times the employee's regular rate, pursuant to 29 U.S.C. § 207."[220] Currently, it is unclear whether the law incorporates the entire 207 framework—including the 207(i) or commissioned sales employee exemption—or a 7(i) omission is intentional, given the law expressly references other FLSA overtime exemptions.

To be exempt from payment of overtime, an employee must be exempt under both state and federal law.[221] If employees are exempt, it means that the overtime rules (and, in certain cases, minimum wage rules) do not apply to them. Employers may, however, still be required to comply with other wage-related laws for exempt employees.

The most commonly used overtime exemptions are the white collar exemptions for persons employed in executive, administrative, or professional capacities. These exemptions are available under both federal and Virginia law; indeed, the federal and state exemptions for these employees are identical. In very general terms, for an employee to qualify as an exempt white collar employee under the executive, administrative, or professional exemptions, the employee must satisfy two criteria. First, the employee must be paid an appropriate type and amount of compensation. In most cases, this requires that the employee be paid on a salary basis, so this criterion is generally referred to as the *salary basis test*. Second, the employee's primary duty must involve exempt work, such as managing other employees. This is known as the *duties test*. The federal regulations provide detailed rules that expand upon these two basic tests for each of the white collar exemptions.

It is important to reiterate that federal wage and hour laws do not preempt state laws[222] and that the law most beneficial to the employee will apply. Therefore, even if an employee meets one of the exemptions discussed below under state law, if the employee does not meet the requirements of the federal exemption (or vice versa), including the salary thresholds, then the employee will not qualify as exempt.

3.3(d)(i) *Executive Exemption*

Until July 1, 2022, when Virginia overtime law will apply only to employees of derivative air carriers,[223] under Virginia law, an employee is covered by the executive exemption if the individual satisfies the following criteria under federal law:

- the employee must receive a salary of at least $684 per week;
- the employee's primary duty must be managing the enterprise or managing a customarily recognized department or subdivision of the enterprise;
- the employee must customarily and regularly direct the work of at least two other full-time employees or the equivalent; and

[220] VA. CODE ANN. § 40.1-29.2(B).

[221] 29 C.F.R. § 778.5.

[222] 29 U.S.C. § 218(a).

[223] VA. CODE ANN. § 40.1-29.3.

- the employee must have the authority to hire or fire other employees, or have the employee's suggestions and recommendations regarding the hiring, firing, advancement, promotion, or any other change of status of other employees be given particular weight.[224]

3.3(d)(ii) *Administrative Exemption*

Until July 1, 2022, when Virginia overtime law will apply only to employees of derivative air carriers,[225] under Virginia law, an employee is covered by the administrative exemption if the individual satisfies the following criteria under federal law:

- the employee must receive a salary or compensation on a fee basis of at least $684 per week;
- the employee's primary duty must be the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers; and
- the employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.[226]

3.3(d)(iii) *Professional Exemption*

Until July 1, 2022, when Virginia overtime law will apply only to employees of derivative air carriers,[227] under Virginia law, an employee is covered by the professional exemption if the individual satisfies the following criteria under federal law:

- the employee must receive a salary or compensation on a fee basis of at least $684 per week;
- the employee's primary duty must be to perform work requiring advanced knowledge;
- the advanced knowledge must be in a field of science or learning; and
- the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

3.3(d)(iv) *Commissioned Sales Exemption*

Effective July 1, 2022, Virginia's overtime law will apply only to employees of derivative air carriers.[228]

3.3(d)(v) *Outside Sales Exemption*

Until July 1, 2022, when Virginia overtime law will apply only to employees of derivative air carriers,[229] in Virginia, the overtime provisions also did not apply to an individual employed as an *outside salesman*, which required the individual to satisfy the following criteria under federal law:

- the employee's primary duty be to make sales or solicit orders or contracts for services; and

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[224] VA. CODE ANN. § 40.1-29.2(D) ("An employer may assert an exemption to the overtime requirement of this section for employees who meet the exemptions set forth in 29 U.S.C. § 213(a)(1)").

[225] VA. CODE ANN. § 40.1-29.3.

[226] VA. CODE ANN. § 40.1-29.2(D) ("An employer may assert an exemption to the overtime requirement of this section for employees who meet the exemptions set forth in 29 U.S.C. § 213(a)(1)").

[227] VA. CODE ANN. § 40.1-29.3.

[228] VA. CODE ANN. § 40.1-29.3.

[229] VA. CODE ANN. § 40.1-29.3.

- the employee customarily and regularly work away from the employer's place of business in making sales or obtaining orders or contracts for services for which a consideration will be paid by the client or customer.[230]

3.4 Meal & Rest Period Requirements

3.4(a) *Federal Meal & Rest Period Guidelines*

3.4(a)(i) *Federal Meal & Rest Periods for Adults*

Federal law contains no generally applicable meal period requirements for adults. Under the FLSA, *bona fide* meal periods (which do not include coffee breaks or time for snacks and which ordinarily last 30 minutes or more) are not considered "hours worked" and can be unpaid.[231] Employees must be completely relieved from duty for the purpose of eating regular meals. Employees are *not* relieved if they are required to perform any duties—active or inactive—while eating. It is not necessary that employees be permitted to leave the premises if they are otherwise completely freed from duties during meal periods.

Federal law contains no generally applicable rest period requirements for adults. Under the FLSA, rest periods of short duration, running from five to 20 minutes, must be counted as "hours worked" and must be paid.[232]

3.4(a)(ii) *Federal Meal & Rest Periods for Minors*

The FLSA does not include any generally applicable meal and rest period requirements for minors. The principles described above as to what constitutes "hours worked" for meal and rest periods applies to minors as well as to adults.

3.4(a)(iii) *Lactation Accommodation Under Federal Law*

The Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act"), which expands the FLSA's lactation accommodation provisions, applies to most employers.[233] Under the FLSA, an employer must provide a reasonable break time for an employee to express breast milk for the employee's nursing child for one year after the child's birth, each time the employee needs to express milk. The employer is not required to compensate an employee receiving reasonable break time for any time spent during the workday for the purpose of expressing milk unless otherwise required by federal, state, or local law. Under the PUMP Act, break time for expressing milk is considered hours worked if the employee is not completely relieved from duty during the entirety of the break.[234] An employer must also provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public,

[230] VA. CODE ANN. § 40.1-29.2(D) ("An employer may assert an exemption to the overtime requirement of this section for employees who meet the exemptions set forth in 29 U.S.C. § 213(a)(1)").

[231] 29 C.F.R. § 785.19.

[232] 29 C.F.R. § 785.18.

[233] 29 U.S.C. § 218d.

[234] 29 U.S.C. § 218d(b)(2).

which may be used by an employee to express breast milk.[235] Exemptions apply for smaller employers and air carriers.[236]

The Pregnant Workers Fairness Act (PWFA), enacted in 2022, also impacts an employer's lactation accommodation obligations. The PWFA requires employers of 15 or more employees to make reasonable accommodations for a qualified employee's known limitations related to pregnancy, childbirth, or related medical conditions.[237] Lactation is considered a related medical condition.[238] Reasonable accommodation related to lactation includes, but is not limited to breaks, space for lactation, and accommodations related to pumping and nursing during work hours.[239] For more information on these topics, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.4(b) *State Meal & Rest Period Guidelines*

3.4(b)(i) *State Meal & Rest Periods for Adults*

There are no generally applicable meal or rest period requirements for adults in Virginia.

3.4(b)(ii) *State Meal & Rest Periods for Minors*

There are no generally applicable meal or rest period requirements for minors in Virginia.

3.4(b)(iii) *Lactation Accommodation Under State Law*

Virginia law provides that a woman may breast feed in any place where she is lawfully present, including any location where she would otherwise be allowed on property that is owned, leased, or controlled by the Commonwealth.[240]

Specific to employment, the Virginia Human Rights Act requires employers of five or more employees to provide reasonable accommodation to the known limitations of a person related to pregnancy, childbirth, or related medical conditions, including lactation, unless the employer can demonstrate that the accommodation would impose an undue hardship. Reasonable accommodations include, but are not limited to, breaks to express breast milk and access to a private location other than a bathroom for the expression of breast milk.[241]

3.5 Working Hours & Compensable Activities

3.5(a) *Federal Guidelines on Working Hours & Compensable Activities*

In contrast to some state laws that provide for mandatory days of rest, the FLSA does not limit the hours or days an employee can work and requires only that an employee be compensated for "all hours" worked in a workweek. Ironically, the FLSA does not define what constitutes hours of work.[242] Therefore, courts

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[235] 29 U.S.C. § 218d(a).

[236] 29 U.S.C. § 218d(c), (d).

[237] 42 U.S.C. § 2000gg–1.

[238] 29 C.F.R. § 1636.3.

[239] 29 C.F.R. § 1636.3.

[240] VA. CODE ANN. § 32.1-370.

[241] VA. CODE ANN. § 2.2-3904.

[242] The FLSA states only that to employ someone is to "suffer or permit" the individual to work. 29 U.S.C. § 203(g).

and agency regulations have developed a body of law looking at whether an activity—such as on-call, training, or travel time—is or is not "work." In addition, the Portal-to-Portal Act of 1947 excluded certain preliminary and postliminary activities from "work time."[243]

As a general rule, employee work time is compensable if expended for the employer's benefit, if controlled by the employer, or if allowed by the employer. All time spent in an employee's principal duties and all time spent in essential ancillary activities must be counted as work time. An employee's *principal duties* include an employee's productive tasks. However, the phrase is expansive enough to encompass not only those tasks an employee is employed to perform, but also tasks that are an "integral and indispensable" part of the principal activities. For more information on this topic, including information on whether time spent traveling, changing clothes, undergoing security screenings, training, waiting or on-call time, and sleep time will constitute hours worked under the FLSA, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.5(b) *State Guidelines on Working Hours & Compensable Activities*

Virginia law does not address general hours of work or compensable activities.

3.6 Child Labor

3.6(a) *Federal Guidelines on Child Labor*

The FLSA limits the tasks minors, defined as persons under 18 years of age, can perform and the hours they can work. Occupational limits placed on minors vary depending on the age of the minor and whether the work is in an agricultural or nonagricultural occupation. There are exceptions to the list of prohibited activities for apprentices and student-learners, or if an individual is enrolled in and employed pursuant to approved school-supervised and school-administered work experience and career exploration programs.[244] Additional latitude is also granted where minors are employed by their parents.

Considerable penalties can be imposed for violation of the child labor requirements, and goods made in violation of the child labor provisions may be seized without compensation to the employer. Employers may protect themselves from unintentional violations of child labor provisions by maintaining an employment or age certificate indicating an acceptable age for the occupation and hours worked.[245] For more information on the FLSA's child labor restrictions, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.6(b) *State Guidelines on Child Labor*

It is unlawful in Virginia to permit a child to work in any occupation involving a recognized hazard capable of causing serious physical harm or death.[246] Virginia generally forbids employment of any child under the

[243] *See, e.g.*, *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 519 (2014) (in determining whether certain preliminary and postliminary activities are compensable work hours, the question is not whether an employer requires an activity (or whether the activity benefits the employer), but rather whether the activity "is tied to the productive work that the employee is employed to perform").

[244] 29 C.F.R. §§ 570.36, 570.50.

[245] 29 C.F.R. § 570.6.

[246] VA. CODE ANN. § 40.1-100.1.

age of 14.[247] Despite this prohibition, there is no private right of action against an employer for the mere hiring of an underage child.[248]

3.6(b)(i) *State Restrictions on Type of Employment for Minors*

General Restrictions. Table 9 summarizes the state restrictions on type of employment by age.

Table 9. State Restrictions on Type of Employment by Age

Age Range	Restrictions
Under Age 18	*Children under the age of 18 are specifically prohibited from performing designated hazardous occupations, including the following types of work:* • mine, quarry, tunnel, underground scaffolding work; • establishments manufacturing or storing explosives or explosive articles; • occupations involving exposure to radioactive substances or ionizing radiation (including X-ray equipment); • operating, oiling, cleaning, or adjusting power-driven machinery; • preparing compositions involving dangerous or poisonous chemicals; • manufacturing of paints, colors, white lead; • brick, tile, or kindred product manufacturing; • excavation, demolition, roofing, wrecking, or ship-breaking; • logging or sawmilling, or in a lath, shingle, or cooperage-stock mill; • work in freezers and meat coolers; • loading and unloading goods to and from trucks; • as a driver or a helper on a truck or commercial vehicle of more than two axles, though minors who are at least age 17 may drive automobiles or trucks on public roadways under certain circumstances; • in any occupation involving slaughtering, meatpacking, processing or rendering; or • in any occupation determined hazardous by rules and regulations promulgated by the state labor department.[249]
Ages 14 & 15	*In addition to the work restrictions on minors under 18, minors aged 14 and 15 cannot work in/as/at:* • manufacturing or mechanical establishments; • canneries; • automatic passenger or freight elevators; • dance studios; • hospitals, nursing homes, clinics, or other establishments providing care for resident patients as a laboratory helper, therapist, orderly, or nurse's aide; • the service of a veterinarian while treating farm animals or horses; • any warehouse;

[247] VA. CODE ANN. § 40.1-78.

[248] *See Howarth v. Rockingham Publ'g Co.*, 20 F. Supp. 2d 959, 968 (W.D. Va. 1998).

[249] VA. CODE ANN. §§ 40.1-100 to 40.1-100.2; 16 VA. ADMIN. CODE §§ 15-30-20 to 15-30-200.

Table 9. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	• processing work or in any laundry or dry-cleaning establishment; • any undertaking establishment or funeral home; • any curb service restaurant; • hotel and motel room service; • brick, coal, or lumber yards; • ice plants; • theater ushering; • scaffolding work or construction trades; • outdoor theaters, cabarets, carnivals, fairs, floor shows, pool halls , clubs, or roadhouses; • lifeguards at the beach; • solicitation, sale, or obtaining of subscription contracts or orders for books, magazines, or other periodicals; • certain processing occupations; • workrooms or workplaces where goods are manufactured, mined, or otherwise processed (subject to exceptions in retail, food service and gasoline establishments); • operating power-driven machinery and hoisting apparatus (subject to exceptions); • occupations in connection with transportation of persons or property by rail, highway, air, water, pipeline, or other means; • certain warehousing and storage occupations; or • communications and public utilities.[250] Minors aged 14 and 15 may work in retail food service and gasoline service establishments provided they are only engaged in certain enumerated tasks.[251]

Restrictions on Selling or Serving Alcohol. Children under age 18 may not sell, serve, or dispense alcoholic beverages for on-premises consumption. Persons under age 21 may not prepare or mix alcoholic beverages in the capacity of bartender.[252]

Moreover, children under age 18 may not work in any place where goods of alcoholic content are manufactured, bottled, or sold for consumption on the premises. A few exceptions exist, including for children working at farm wineries, licensed under state law, if the minors do not serve or dispense any alcoholic beverages. Exceptions also apply for establishments where the sale of alcoholic beverages is merely incidental to the main business actually conducted, or for delivery of alcoholic goods.[253]

[250] VA. CODE ANN. § 40.1-100; 16 VA. ADMIN. CODE § 15-30-220.

[251] 16 VA. ADMIN. CODE § 15-30-230.

[252] VA. CODE ANN. § 4.1-307.

[253] VA. CODE ANN. § 40.1-100; 16 VA. ADMIN. CODE § 15-30-200.

3.6(b)(ii) *State Limits on Hours of Work for Minors*

No child under the age of 16 can be employed during school hours unless the child is at least 14 years old and is enrolled in a school work-training program and a work-training certificate has been issued.[254] In addition, such minors cannot work in any nonagricultural occupation:

- during school hours (unless enrolled in a work-training program);
- more than three hours on a school day;
- more than eight hours on a nonschool day;
- more than 18 hours in a week when school is in session;
- more than 40 hours in a week when school is not in session; or
- between 7:00 P.M. and 7:00 A.M.

Minors may work, however, until 9:00 P.M. from June 1st through Labor Day. Special rules apply when a minor works in agriculture.

3.6(b)(iii) *State Child Labor Exceptions*

Notwithstanding the foregoing, exceptions to Virginia's child labor laws include procedures and provisions that, if followed, allow children 14 years of age or older to engage in various jobs such as serving as a newspaper carrier outside of school hours, performing office work of a clerical nature, working at laundry/dry cleaning stores where no processing is done on the premises, and serving in restaurants.[255]

Additionally, state law provides several exceptions for children under the age of 14, such as household chores, work on farms, in orchards or in gardens with the consent of a parent or guardian and as a page or clerk for either the House of Delegates or Senate of Virginia.[256]

3.6(b)(iv) *State Work Permit or Waiver Requirements*

Employers must procure and keep on file an employment certificate for each minor in its employment who is under age 16. The employment certificate must be accessible to any school attendance officer, representative of the Department of Labor and Industry, or other authorized persons.[257]

There are two kinds of employment certificates: work-training certificates (for children age 14 to 16 to work during school hours when the child is enrolled in a regular school work-training program) and vacation or part-time employment certificates (for children aged 14 to 16 to work during vacations, when school is not in session, or before or after school on days when school is in session).[258]

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[254] VA. CODE ANN. § 40.1-78.

[255] VA. CODE ANN. §§ 40.1-100, 40.1-109; 16 VA. ADMIN. CODE § 15-40-40(C).

[256] VA. CODE ANN. § 40.1-78; 16 VA. ADMIN. CODE §§ 15-40-30, 15-40-40, 15-40-50.

[257] VA. CODE ANN. § 40.1-84.

[258] VA. CODE ANN. §§ 40.1-85, 40.1-87, 40.1-88.

3.6(b)(v) *State Enforcement, Remedies & Penalties*

Anyone who employs or permits a child to be employed in violation of Virginia's child labor laws faces a maximum civil penalty of $2,500 for each violation.[259] However, if the violation results in the serious injury or death of a child, an employer may be subject to a civil penalty of up to $25,000. In addition, it is a felony for any person employing a child to willfully or negligently cause or permit the life, health, or morals of a child to be endangered, or the health of a child to be injured, or to cause or permit a child to be overworked, tortured, tormented, mutilated, beaten, or cruelly treated.[260]

3.7 Wage Payment Issues

3.7(a) *Federal Guidelines on Wage Payment*

There is no federal wage payment law. The FLSA covers minimum wage and overtime requirements, but would not generally be considered a "wage payment" law as the term is used in state law to define when and how wages must be paid.

3.7(a)(i) *Form of Payment Under Federal Law*

Authorized Instruments. Wages may be paid by cash, check, or facilities (*e.g.*, board or lodging).[261]

Direct Deposit. Neither the FLSA, nor its implementing regulations, address direct deposit of employee wages. The U.S. Department of Labor (DOL) has briefly considered the permissibility of direct deposit by stating:

> The payment of wages through direct deposit into an employee's bank account is an acceptable method of payment, provided employees have the option of receiving payment by cash or check directly from the employer. As an alternative, the employer may make arrangements for employees to cash a check drawn against the employer's payroll deposit account, if it is at a place convenient to their employment and without charge to them.[262]

According to the Consumer Financial Protection Bureau (CFPB), an employer may require direct deposit of wages by electronic means if the employee is allowed to choose the institution that will receive the direct deposit. Alternatively, an employer may give employees the choice of having their wages deposited at a particular institution (designated by the employer) or receiving their wages by another means, such as by check or cash.[263]

Payroll Debit Card. Employers may pay employees using payroll card accounts, so long as employees have the choice of receiving their wages by at least one other means.[264] The "prepaid rule" regulation defines

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[259] VA. CODE ANN. § 40.1-113(A).

[260] VA. CODE ANN. § 40.1-103.

[261] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf; *see also* 29 C.F.R. § 531.32 (description of "other facilities").

[262] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c00.

[263] Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013), *available at* http://files.consumerfinance.gov/f/201309_cfpb_payroll-card-bulletin.pdf.

[264] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013) and Consumer Fin. Prot. Bureau, *Ask CFPB: Prepaid Cards, If my employer offers me*

a *payroll card account* as an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer's wages, salary, or other employee compensation such as commissions are made on a recurring basis, whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution, or any other person.[265]

Employers that use payroll card accounts must comply with several requirements set forth in the prepaid rule. Employers must give employees certain disclosures before the employees choose to be paid via a payroll card account, including a short-form disclosure, a long-form disclosure, and other information that must be disclosed in close proximity to the short-form disclosure. Employees must receive the short-form disclosure and either receive or have access to the long-form disclosure before the account is activated. All disclosures must be provided in writing. Importantly, within the short-form disclosure, employers must inform employees in writing and before the card is activated that they need not receive wages by payroll card. This disclosure must be very specific. It must provide a clear fee disclosure and include the following statement or an equivalent: "You do not have to accept this payroll card. Ask your employer about other ways to receive your wages." Alternatively, a financial institution or employer may provide a statement that the consumer has several options to receive wages or salary, followed by a list of the options available to the consumer, and directing the consumer to tell the employer which option the customer chooses using the following language or similar: "You have several options to receive your wages: [list of options]; or this payroll card. Tell your employer which option you choose." This statement must be located above the information about fees. A short-form disclosure covering a payroll card account also must contain a statement regarding state-required information or other fee discounts or waivers.[266] As part of the disclosures, employees must: (1) receive a statement of pay card fees; (2) have ready access to a statement of all fees and related information; and (3) receive periodic statements of recent account activity or free and easy access to this information online. Under the prepaid rule, employees have limited responsibility for unauthorized charges or other unauthorized access, provided they have registered their payroll card accounts.[267]

The CFPB provides numerous online resources regarding prepaid cards, including Frequently Asked Questions. Employers that use or plan to use payroll card accounts should consult these resources, in addition to the prepaid card regulation, and seek knowledgeable counsel.[268]

3.7(a)(ii) *Frequency of Payment Under Federal Law*

Federal law does not specify the timing of wage payment and does not prohibit payment on a semi-monthly or monthly basis. However, all wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned. FLSA regulations state that if

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a payroll card, do I have to accept it? (Sept. 4, 2020), *available at* https://www.consumerfinance.gov/ask-cfpb/if-my-employer-offers-me-a-payroll-card-do-i-have-to-accept-it-en-407/.

[265] 12 C.F.R. § 1005.2(b)(3)(i)(A).

[266] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *Guide to the Short Form Disclosure* (Mar. 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_guide-to-short-form-disclosure.pdf; *Prepaid Disclosures* (Apr. 1, 2019), *available at* https://files.consumerfinance.gov/f/documents/102016_cfpb_PrepaidDisclosures.pdf.

[267] 12 C.F.R. § 1005.18.

[268] *See* Consumer Fin. Prot. Bureau, *Prepaid Cards*, *available at* https://www.consumerfinance.gov/ask-cfpb/category-prepaid-cards/ and *Prepaid Rule Small Entity Compliance Guide* (Apr. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_small-entity-compliance-guide.pdf.

an employer cannot calculate how much it owes an employee in overtime by payday, it must pay that employee overtime as soon as possible and no later than the next payday.[269]

3.7(a)(iii) *Final Payment Under Federal Law*

Federal law does not address when final wages must be paid to discharged employees or to employees who voluntarily quit. However, as noted in **3.7(a)(ii)**, wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned.

3.7(a)(iv) *Notification of Wage Payments & Wage Records Under Federal Law*

Federal law does not generally require employers to provide employees wage statements when wages are paid. However, federal law does require employers to furnish pay stubs to certain unique classifications of employees, including migrant farm workers.

Federal law does not address whether electronic delivery of earnings statements is permissible.

3.7(a)(v) *Changing Regular Paydays or Pay Rate Under Federal Law*

There are no general notice requirements under federal law should an employer wish to change an employee's payday or wage rate. However, it is recommended that employees receive advance written notice before a change in regular paydays or pay rate occurs.

3.7(a)(vi) *Paying for Expenses Under Federal Law*

The FLSA does not have a general expense reimbursement obligation. Nonetheless, it prohibits employers from circumventing minimum wage and overtime laws by passing onto employees the cost of items that are primarily for the benefit or convenience of the employer, if doing so reduces an employee's wages below the highest applicable minimum wage rate or cuts into overtime premium pay.[270] Because the FLSA requires an employer to pay minimum wage and overtime premiums "free and clear," the employer must reimburse employees for expenses that are primarily for the benefit of the employer if those expenses would reduce the applicable required minimum wage or overtime compensation.[271] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[272] tools and equipment,[273] and business transportation and travel.[274] Additionally, if an employee is reimbursed for expenses normally incurred by an employee that primarily benefit the employer, the reimbursement cannot be included in the employee's regular rate.[275]

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[269] 29 C.F.R. § 778.106; *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30b04, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

[270] *See* 29 U.S.C. §§ 203(m), 206; 29 C.F.R. §§ 531.2, 531.32(a), and 531.36(a); U.S. Dep't of Labor, Wage & Hour Div., *Fact Sheet #16: Deductions From Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act (FLSA)* (rev. July 2009).

[271] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

[272] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c12.

[273] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.35; U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA 2001-7 (Feb. 16, 2001).

[274] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[275] 29 C.F.R. § 778.217.

3.7(a)(vii) *Wage Deductions Under Federal Law*

Permissible Deductions. Under the FLSA, an employer can deduct:

- state and federal taxes, levies, and assessments (*e.g.*, income, Social Security, unemployment) from wages;[276]
- amounts ordered by a court to pay an employee's creditor, trustee, or other third party, under garnishment, wage attachment, trustee process, or bankruptcy proceedings (the employer or anyone acting on its behalf cannot profit from the transaction);[277]
- amounts as directed by an employee's voluntary assignment or order to pay an employee's creditor, donee, or other third party (the employer or agent cannot directly or indirectly profit or benefit from the transaction);[278]
- with an employee's authorization for:
  - the purchase of U.S. savings stamps or U.S. savings bonds;
  - union dues paid pursuant to a valid and lawful collective bargaining agreement;
  - payments to the employee's store accounts with merchants wholly independent of the employer;
  - insurance premiums, if paid to independent insurance companies where the employer is under no obligation to supply the insurance and derives, directly or indirectly, no benefit or profit from it; or
  - voluntary contributions to churches and charitable, fraternal, athletic, and social organizations, or societies from which the employer receives no profit or benefit, directly or indirectly;[279]
- the reasonable cost of providing employees board, lodging, or other facilities by including this cost as wages, if the employer customarily furnishes these facilities to employees;[280] or
- amounts for premiums the employer paid while maintaining benefits coverage for an employee during a leave of absence under the Family and Medical Leave Act if the employee fails to return from leave after leave is exhausted or expires, if the deductions do not otherwise violate applicable federal or state wage payment or other laws.[281]

Additionally, while the FLSA contains no express provisions concerning deductions relating to overpayments made to an employee, loans and advances, or negative vacation balance, informal guidance from the DOL suggests such deductions may nonetheless be permissible. While this informal guidance may be interpreted to permit a deduction for loans to employees, employers should consult with counsel before deducting from an employee's wages. An employer can deduct the principal of a loan or wage

[276] 29 C.F.R. § 531.38.

[277] 29 C.F.R. § 531.39. The amount subject to withholding is governed by the federal Consumer Credit Protection Act. 15 U.S.C. §§ 1671 *et seq*.

[278] 29 C.F.R. § 531.40.

[279] 29 C.F.R. § 531.40.

[280] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[281] 29 C.F.R. § 825.213.

advance, even if the deduction cuts into the minimum wage or overtime owed. However, deductions for interest or administrative costs on the loan or advance are illegal to the extent that they cut into the minimum wage or overtime pay. Loans or advances must be verified.[282]

An employer may also be able to deduct for wage overpayments even if the deduction cuts into the employee's FLSA minimum wage or overtime pay. The deduction can be made in the next pay period or several pay periods later. An employer cannot, however, charge an administrative fee or charge interest that brings the payment below the minimum wage.[283] Finally, if an employee is granted vacation pay before it accrues, with the understanding it constitutes an advance of pay, and the employee quits or is fired before the vacation is accrued, an employer can recoup the advanced vacation pay, even if this cuts into the minimum wage or overtime owed an employee.[284]

Deductions During Non-Overtime v. Overtime Workweeks. Whether an employee receives overtime during a given workweek affects an employer's ability to take deductions from the employee's wages. During non-overtime workweeks, an employer may make qualifying deductions (*i.e.*, the cost is reasonable and there is no employer profit) for "board, lodging, or other facilities" even if the deductions would reduce an employee's pay below the federal minimum wage. Deductions for articles that do not qualify as "board, lodging, or other facilities" (*e.g.*, tools, equipment, cash register shortages) can be made in non-overtime workweeks if, after the deduction, the employee is paid at least the federal minimum wage.[285]

During overtime workweeks, deductions can be made on the same basis in overtime weeks as in non-overtime weeks if the amount deducted does not exceed the amount which could be deducted if the employee had not worked overtime during the workweek. Deductions that exceed this amount for articles that are not "facilities" are prohibited. There is no limit on the amount that can be deducted for qualifying deductions for "board, lodging, or other facilities." However, deductions made only in overtime weeks, or increases in prices charged for articles or services during overtime workweeks will be scrutinized to determine whether they are manipulations to evade FLSA overtime requirements.[286]

Prohibited Deductions. The FLSA prohibits an employer from making deductions for administrative or bookkeeping expenses incurred by an employer to the extent they cut into the minimum wage and overtime owed an employee.[287]

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[282] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

[283] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-19NA (Oct. 8, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[284] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-17NA (Oct. 6, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[285] 29 C.F.R. § 531.36.

[286] 29 C.F.R. § 531.37.

[287] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

3.7(b) *State Guidelines on Wage Payment*

3.7(b)(i) *Form of Payment Under State Law*

Authorized Instruments. In Virginia, wages may be paid in cash or check and by direct deposit and payroll debit card.[288] *Wages* is defined as "legal tender of the United States or checks or drafts on banks negotiable into cash on demand or upon acceptance at full value."[289] Wages also "may include the reasonable cost to the employer of furnishing meals and lodging to an employee, if such meals or lodging are customarily furnished by the employer, and used by the employee."[290]

Direct Deposit. Mandatory direct deposit is permitted in Virginia. An employer can pay wages "by electronic automated fund transfer in lawful money of the United States into an account in the name of the employee at a financial institution designated by the employee."[291]

Payroll Debit Card. An employer can pay wages, with employee's affirmative consent, "by credit to a prepaid debit card or card account from which the employee is able to withdraw or transfer funds with full written disclosure by the employer of any applicable fees."[292]

If any employee hired after January 1, 2010 fails to designate a financial institution for direct deposit, employers may utilize prepaid credit cards or a debit card without an employee's consent. Employees must be able to make at least one free withdrawal from the prepaid credit card or debit card per pay period.[293]

3.7(b)(ii) *Frequency of Payment Under State Law*

Employers must establish regular pay periods and rates of pay for employees. Salaried employees must be paid at least once each month. Hourly employees must be paid at least once every two weeks or twice in each month. An employer may pay its employees on a semi-monthly basis.[294] These requirements do not apply to executive personnel.[295]

3.7(b)(iii) *Final Payment Under State Law*

Upon termination, or when an employee voluntarily quits, an employer must pay the employee all wages or salary due no later than the date they would have been paid if still employed.[296]

3.7(b)(iv) *Notification of Wage Payments & Wage Records Under State Law*

Virginia law requires employers to provide each employee with a written statement on each regular pay date that shows:

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[288] VA. CODE ANN. § 40.1-29(B).

[289] VA. CODE ANN. § 40.1-28.9(B).

[290] VA. CODE ANN. § 40.1-28.9(B).

[291] VA. CODE ANN. § 40.1-29(B).

[292] VA. CODE ANN. § 40.1-29(B).

[293] VA. CODE ANN. § 40.1-29(B).

[294] VA. CODE ANN. § 40.1-29.

[295] VA. CODE ANN. § 40.1-29.

[296] VA. CODE ANN. § 40.1-29.

- the employer's name and address;
- the number of hours worked in the pay period;
- the employee's rate of pay;
- the employee's gross wages earned during the pay period; and
- the amount and purpose of any deductions from gross wages.

The information must be provided by a written paystub or online accounting. The paystub or online accounting must include sufficient information to enable the employee to determine how the gross and net pay were calculated.

The law provides that employers engaged in agricultural employment, including agribusiness and forestry, must provide a written statement of gross wages and deductions for a pay period only upon an employee's request. Employers must also include in the pay statement the number of hours worked during the pay period, if the employee is paid hourly, or a salary that is less than the standard salary level that establishes an exemption from the federal Fair Labor Standards Act's overtime premium pay requirements.[297]

3.7(b)(v) *Wage Transparency*

An employer is prohibited from discharging from employment or taking other retaliatory action against an employee because the employee:

- inquired about or discussed with, or disclosed to, another employee any information about either the employee's own wages or other compensation or about any other employee's wages or other compensation; or
- filed a complaint with the Department of Labor and Industry alleging a violation of the wage transparency provisions.[298]

These provisions do not apply to employees who have access to the compensation information of other employees or job applicants as part of their essential job functions who disclose the pay of other employees or applicants to individuals who do not otherwise have access to compensation information, unless the disclosure is:

- in response to a formal complaint or charge;
- in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer; or
- consistent with a legal duty to furnish information.[299]

3.7(b)(vi) *Changing Regular Paydays or Pay Rate Under State Law*

There are no general notice requirements under Virginia law regarding making a change to regular paydays or an employee's rate of pay. Employers, however, should consider providing employees with advance written notice before a change occurs.

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[297] VA. CODE ANN. § 40.1-29(C).

[298] VA. CODE ANN. § 40.1-28.7:7.

[299] VA. CODE ANN. § 40.1-28.7:7.

3.7(b)(vii) *Paying for Expenses Under State Law*

Virginia law does not include provisions addressing whether an employer is required to indemnify employees for work expenses.

3.7(b)(viii) *Wage Deductions Under State Law*

Requirements for Deductions. An employer cannot withhold any part of employee wages or salaries, except for payroll, wage, or withholding taxes, or in accordance with law, unless it obtains the employee's written, signed authorization. If requested by an employee, an employer must provide an employee a written statement of the employee's gross wages earned during a pay period, along with the amount and purpose of any wage deductions. Employers must provide each employee with a written statement on each regular pay date that shows:

- the employer's name and address;
- the number of hours worked in the pay period;
- the employee's rate of pay;
- the employee's gross wages earned during the pay period; and
- the amount and purpose of any deductions from gross wages.

The information must be provided by a written paystub or online accounting.

Employers engaged in agricultural employment, including agribusiness and forestry, must provide a written statement of gross wages and deductions for a pay period only upon an employee's request.[300]

Permissible Deductions. The following deductions are also permitted under Virginia law, under certain circumstances, for uniforms, tools, and equipment.

Regardless of whether a work uniform is required by law, an employer, or the nature of the work, an employer can require an employee to pay all uniform costs if the deduction does not cause an employee's pay to fall below the minimum wage. Moreover, an employer can require an employee to pay up-front uniform costs, can change a monthly rental or maintenance fees, and can ask an employee to pay for uniforms through wage deductions. If payment is effectuated through deductions, a written and signed authorization is required.[301]

If an employer obtains an employee's written and signed consent, the employer may deduct from wages for repayment for work tools and equipment purchased from the employer. However, the deduction cannot cause an employee's pay to fall below the minimum wage.[302]

3.7(b)(ix) *Wage Assignments & Wage Garnishments*

Wage Assignment. An assignment of wages due or to become due is valid and enforceable against the employer of the assignor only if: (1) the employer has expressly consented in writing and the employer

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[300] VA. CODE ANN. § 40.1-29.

[301] Virginia Dep't of Labor and Indus., Div. of Labor and Emp't Law, FIELD OPERATIONS MANUAL, Ch. 10 Payment of Wage at §§ 7.00, 14.00 (Jan. 2009), *available at* https://townhall.virginia.gov/L/ViewGDoc.cfm?gdid=5539.

[302] Virginia Dep't of Labor and Indus., Div. of Labor and Emp't Law, FIELD OPERATIONS MANUAL, Ch. 10 Payment of Wage at § 14.00 (Jan. 2009).

has given the consent to the assignee; or (2) if all of the statutory requirements are fulfilled (including, for example, execution of an assignment as a separate instrument, in triplicate).[303] Nevertheless, an assignment may be valid when the statutory requirements have been met, and there is no written consent, if the employer has acknowledged the validity of the assignment by making some payment to the assignee.[304]

An employee may voluntarily assign wages for purposes of child support payments. Additionally, a court may direct an employer to deduct child support payments from an employee's earnings.[305] Any wages not claimed by either the employee or, in the case of death, the employee's estate, within one year after becoming payable, are presumed abandoned.[306]

Wage Garnishment. Wages that are garnished for purposes of bankruptcy may not exceed the lesser of 25% of weekly disposable earnings or the amount by which weekly disposable earnings for that week exceed 40 times the federal minimum hourly wage or the state minimum wage, whichever is greater.[307] No employer may discharge an employee because the employee's earnings are subject to garnishment.[308] A minor's wages may not be garnished.[309]

3.7(b)(x) *State Enforcement, Remedies & Penalties*

The Virginia Wage Payment Act does not create a right to be paid for work performed. Such a right exists under Virginia state law, if at all, under common-law doctrines such as contract or *quantum meruit*.[310] To the extent employees wish to seek relief for such a common-law claim, they may proceed directly to court. However, if an employee wishes to pursue a violation of the Wage Payment Act itself, such as a violation of its provisions governing the methods or timing of pay, the employee may file a written complaint with the Virginia Commissioner of Labor and Industry.[311] There is no private cause of action under the Virginia Wage Payment Act.[312]

Any employer that knowingly fails to pay wages in accordance with the Virginia Wage Payment Act is subject to a civil penalty of up to $1,000 for each violation.[313] An employer that willfully and with intent to defraud fails to pay wages in accordance with the law is guilty of a Class 1 misdemeanor, if the value of the wages earned and unpaid is less than $10,000. If the value of such unpaid wages is more than $10,000 or if the employer has been previously convicted of a violation of the Wage Payment Act, the employer is

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303 VA. CODE ANN. § 40.1-31.

304 *See Knight v. Peoples Nat'l Bank of Lynchburg*, 29 S.E.2d 364, 367 (Va. 1944).

305 VA. CODE ANN. § 20-79.1.

306 VA. CODE ANN. § 55-210.8:2; VA. CODE ANN. § 55.1-2516.

307 VA. CODE ANN. § 34-29(a); *In re Reynard*, 250 B.R. 241, 247 n.8 (Bankr. E.D. Va. 2000); *In re Wilkinson*, 196 B.R. 311, 316 (Bankr. E.D. Va. 1996).

308 VA. CODE ANN. § 34-29(f).

309 VA. CODE ANN. § 34-33.

310 *See Pallone v. Marshall Legacy Inst.*, 97 F. Supp. 2d 742, 745 (E.D. Va. 2000).

311 VA. CODE ANN. § 40.1-29(F).

312 *See Pallone*, 97 F. Supp. 2d at 746-47.

313 VA. CODE ANN. § 40.1-29(A)(2).

guilty of a Class 6 felony.[314] In addition to these civil and criminal penalties, any employer found to have violated the Wage Payment Act must pay any outstanding wages plus interest.[315]

3.8 Other Benefits

3.8(a) *Vacation Pay & Similar Paid Time Off*

3.8(a)(i) *Federal Guidelines on Vacation Pay & Similar Paid Time Off*

To the extent an "employee welfare benefit plan" is established or maintained for the purpose of providing vacation benefits for participants or their beneficiaries, it may be governed under the federal Employee Retirement Income Security Act (ERISA).[316] However, an employer program of compensating employees for vacation benefits out of the employer's general assets is not considered a covered welfare benefit plan.[317] Further, the U.S. Supreme Court, in *Massachusetts v. Morash*, noted that extensive state regulation of vesting, funding, and participation rights of vacation benefits may provide greater protections for employees than ERISA and, as a result, the court was reluctant to have ERISA preempt state law in situations where it was not clearly indicated.[318]

3.8(a)(ii) *State Guidelines on Vacation Pay & Similar Paid Time Off*

Virginia statutory law does not require employers to provide fringe benefits such as vacation, sick, holiday, or severance pay, and employers may establish any or no policy regarding such fringe benefits. Accordingly, it is likely that an employer may establish a vacation policy with a cap on accrual, with a "use-it-or-lose-it" provision, or that requires forfeiture of unused vacation time when employment ends. However, once an employer does establish a policy and promises vacation pay and other types of additional compensation, the employer may not arbitrarily withhold or withdraw these fringe benefits retroactively, and the employer must apply the vacation policy in a nondiscriminatory manner. Therefore, employers should draft clear, precise, and complete policies and procedures regarding these benefits, as they can become contractual obligations and subject the employer to liability if withheld or reduced without notice.

3.8(b) *Holidays & Days of Rest*

3.8(b)(i) *Federal Guidelines on Holidays & Days of Rest*

There is no federal law requiring that employees be provided a day of rest each week, or be compensated at a premium rate for work performed on the seventh consecutive day of work or on holidays.

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[314] VA. CODE ANN. § 40.1-29(E).

[315] VA. CODE ANN. § 40.1-29(G).

[316] 29 U.S.C. § 1002.

[317] 29 C.F.R. § 2510.3-1; *see also* U.S. Dep't of Labor, *Advisory Opinion 2004-10A* (Dec. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-10a; U.S. Dep't of Labor, *Advisory Opinion 2004-08A* (July 2, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-08a; U.S. Dep't of Labor, *Advisory Opinion 2004-03A* (Apr. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2004-03a.

[318] 490 U.S. 107, 119 (1989).

3.8(b)(ii) *State Guidelines on Holidays & Days of Rest*

Virginia does not require employers to provide employees with a day of rest each week, or compensate employees at a premium rate for work performed on the seventh consecutive day of work or on holidays.

3.8(c) *Recognition of Domestic Partnerships & Civil Unions*

3.8(c)(i) *Federal Guidelines on Domestic Partnerships & Civil Unions*

Federal law does not regulate or define domestic partnerships and civil unions. States and municipalities are free to provide for domestic partnership and civil unions within their jurisdictions. Thus, whether a couple may register as domestic partners or enter into a civil union depends on their place of residence. States may also pass laws to regulate whether employee benefit plans must provide coverage for an employee's domestic partner or civil union partner.

Whether such state laws apply to an employer's benefit plans depends on whether the benefits are subject to ERISA. Most state and local laws that relate to an employer's provision of health benefit plans for employees are preempted by ERISA. Self-insured plans, for example, are preempted by ERISA. If the plan is preempted by ERISA, employers may not be required to comply with the states' directives on requiring coverage for domestic partners or parties to a civil union.[319] ERISA does not preempt state laws that regulate insurance, so employer health benefit plans that provide benefits pursuant to an insurance contract are subject to state laws requiring coverage for domestic partners or civil union partners.

The federal Comprehensive Omnibus Budget Reconciliation Act (COBRA) requires group health plans to provide continuation coverage under the plan for a specified period of time to each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event (*e.g.*, the employee's death or termination from employment).[320] However, under COBRA, only an employee and the employee's spouse and dependent children are considered "qualified beneficiaries."[321] Here again, states may choose to extend continuation coverage requirements to domestic partners and civil union partners under state mini-COBRA statutes.

3.8(c)(ii) *State Guidelines on Domestic Partnerships & Civil Unions*

Virginia does not recognize domestic partnerships or civil unions.[322] Accordingly, state law does not address the issue of whether an employee's domestic partner or civil union partner would be considered an eligible dependent for purposes of employee benefits.

3.9 Leaves of Absence

3.9(a) *Family & Medical Leave*

3.9(a)(i) *Federal Guidelines on Family & Medical Leave*

The federal Family and Medical Leave Act (FMLA) requires covered employers to provide eligible employees up to 12 weeks of unpaid leave in any 12-month period:

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[319] 29 U.S.C. § 1144.

[320] 29 U.S.C. § 1161.

[321] 29 U.S.C. § 1167(3).

[322] However, city employees of the City of Alexandria may be eligible for domestic partnership benefits.

- for the birth or placement of a child for adoption or foster care;[323]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[324]
- to take medical leave when the employee is unable to work because of a serious health condition;[325]
- for a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty or called to covered active duty status as a member of the National Guard, armed forces, or armed forces reserves (see **3.9(k)(i)** for information on "qualifying exigency leave" under the FMLA); and
- to care for a next of kin service member with a serious injury or illness (see **3.9(k)(i)** for information on the 26 weeks available for "military caregiver leave" under the FMLA).

A *covered employer* is engaged in commerce or in any industry or activity affecting commerce and has at least 50 employees in 20 or more workweeks in the current or preceding calendar year.[326] A *covered employee* has completed at least 12 months of employment and has worked at least 1,250 hours in the last 12 months at a location where 50 or more employees work within 75 miles of each other.[327] For information on the FMLA, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

3.9(a)(ii) *State Guidelines on Family & Medical Leave*

Virginia law does not address family and medical leave for private-sector employees.

3.9(b) *Paid Sick Leave*

3.9(b)(i) *Federal Guidelines on Paid Sick Leave*

Federal law does not require private employers (that are not government contractors) to provide employees paid sick leave. Executive Order No. 13706 requires certain federal contractors and subcontractors to provide employees with a minimum of 56 hours of paid sick leave annually, to be accrued at a rate of at least one hour of paid sick leave for every 30 hours worked.[328] The paid sick leave requirement applies to certain contracts solicited—or renewed, extended, or amended—on or after January 1, 2017, including all contracts and subcontracts of any tier thereunder. For more information on this topic, see **LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS**.

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[323] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[324] 29 C.F.R. §§ 825.102, 825.112, and 825.113; *see also* U.S. Dep't of Labor, Wage & Hour Div., *Administrator's Interpretation No. 2010-3* (June 22, 2010), *available at* https://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf (guidance on who may take time off to care for a sick, newly-born, or adopted child when the employee has no legal or biological attachment to the child).

[325] 29 C.F.R. §§ 825.112, 825.113.

[326] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

[327] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

[328] 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

3.9(b)(ii) *State Guidelines on Paid Sick Leave*

Virginia law does not generally address paid sick leave for private-sector employees. However, effective July 1, 2021, certain home health workers must receive paid sick leave.[329]

3.9(c) *Pregnancy Leave*

3.9(c)(i) *Federal Guidelines on Pregnancy Leave*

Three federal statutes are generally implicated when handling leave related to pregnancy: the Pregnancy Discrimination Act, which amended Title VII of the Civil Rights Act of 1964 ("Title VII") in 1978; the Family and Medical Leave Act; and the Americans with Disabilities Act. For additional information, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

Pregnancy Discrimination Act (PDA). Under the PDA, which as part of Title VII applies to employers with 15 or more employees, disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions must be treated the same as disabilities caused or contributed to by other medical conditions under an employer's health or disability insurance or sick leave plan.[330] Policies and practices involving such matters as the commencement and duration of leave, the availability of extensions, reinstatement, and payment under any health or disability insurance or sick leave plan must be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms as they are applied to other disabilities.

An employer must allow individuals with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work. However, an employer may not compel an employee to take leave because the employee is pregnant, as long as the employee is able to perform their job. Moreover, an employer may not prohibit employees from returning to work for a set length of time after childbirth. Thus, employers must hold open a job for a pregnancy-related absence for the same length of time as jobs are held open for employees on sick or disability leave.

Family and Medical Leave Act (FMLA). A pregnant employee may take FMLA leave intermittently for prenatal examinations or for their own serious health condition, such as severe morning sickness.[331] FMLA leave may also be used for the birth or placement of a child; however, the use of intermittent leave (as opposed to leave taken on an intermittent or reduced schedule) is subject to the employer's approval.

Americans with Disabilities Act (ADA). Pregnancy-related impairments may constitute disabilities for purposes of the ADA. The federal Equal Employment Opportunity Commission (EEOC) takes the position that leave is a reasonable accommodation for pregnancy-related impairments, and may be granted in addition to what an employer would normally provide under a sick leave policy for reasons related to the impairment.[332] An employee may also be allowed to take leave beyond the maximum FMLA leave if the additional leave would be considered a reasonable accommodation.

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[329] *See* VA. CODE ANN. §§ 40.1-33.3 – 40.1-33.6

[330] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

[331] 29 C.F.R. § 825.202.

[332] EEOC, Notice 915.003, EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues (June 25, 2015), available at https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm; see also EEOC, Facts About Pregnancy Discrimination (Sept. 8, 2008), available at https://www.eeoc.gov//facts/fs-preg.html.

Several states provide greater protections for employees with respect to pregnancy. For example, states may have specific laws prohibiting discrimination based on pregnancy or providing separate protections for pregnant individuals, including the requirement that employers provide reasonable accommodations to pregnant employees to enable them to continue working during their pregnancies, provided that no undue hardship on the employer's business operations would result. These protections are discussed in **3.11(c)**. To the extent that a state law focuses primarily on providing job-protected leave for employees with disabling pregnancy-related health conditions, that state law is discussed below.

3.9(c)(ii) *State Guidelines on Pregnancy Leave*

Under the Virginia Human Rights Act, women affected by pregnancy, childbirth, or related medical conditions must be treated the same as persons who are not pregnant but are similar in their abilities and inabilities. This provision applies to employers that employ more than five but fewer than 15 employees. Accordingly, employers should treat employees disabled by pregnancy the same as they treat other temporarily disabled employees for leave of absence purposes.[333] In addition, employers of five or more employees must provide reasonable accommodation to the known limitations of a person related to pregnancy, childbirth, or related medical conditions, unless the employer can demonstrate that the accommodation would impose an undue hardship. Reasonable accommodations include, but are not limited to, leave to recover from childbirth.[334]

3.9(d) *Adoptive Parents Leave*

3.9(d)(i) *Federal Guidelines on Adoptive Parents Leave*

An eligible employee may take time off to care for a newly-adopted child as part of their leave entitlement under the FMLA. For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.9(d)(ii) *State Guidelines on Adoptive Parents Leave*

Virginia law does not address adoptive parents leave for private-sector employees.

3.9(e) *School Activities Leave*

3.9(e)(i) *Federal Guidelines on School Activities Leave*

Federal law does not address school activities leave for private-sector employees.

3.9(e)(ii) *State Guidelines on School Activities Leave*

Virginia law does not address school activities leave for private-sector employees.

3.9(f) *Blood, Organ, or Bone Marrow Donation Leave*

3.9(f)(i) *Federal Guidelines on Blood, Organ, or Bone Marrow Donation*

Federal law does not address blood, organ, or bone marrow donation leave for private-sector employees.

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[333] VA. CODE ANN. §§ 2.2-3901, 2.2-2639(B).

[334] VA. CODE ANN. § 2.2-3904.

3.9(f)(ii) *State Guidelines on Blood, Organ, or Bone Marrow Donation*

Virginia law provides for *organ donation leave*, defined as leave for the purpose of donating one or more human organs, including bone marrow, to be medically transplanted into the body of another individual. Covered employers are those with 50 or more employees. An eligible employee is an employee who has requested organ or bone marrow donation leave and who, as of the date that the requested leave begins, will have been employed by that employer for at least (1) a 12-month period and (2) 1,250 hours during the previous 12 months.[335]

Organ Donor Leave. A covered employer must provide eligible employees (1) up to 60 business days of unpaid leave in any 12-month period to serve as an organ donor, and (2) up to 30 business days of unpaid leave in any 12-month period to serve as a bone marrow donor.[336] To use this leave, an eligible employee must provide the employer with written certification from the employee's physician verifying that the eligible employee is an organ donor or a bone marrow donor and there is a medical necessity for the donation of the organ or bone marrow.[337]

Interaction with Other Laws and Policies. Organ and bone marrow donation leave does not run concurrently with leave taken under the federal Family and Medical Leave Act.[338] Further, nothing in the law prevents or discourages employers from implementing leave policies that are more generous than the leave required under the new law. The law also does not prohibit employees from taking paid sick leave or other paid time off to which they are entitled in addition to or instead of using unpaid organ or bone marrow donation leave. Finally, the law does not impact an employer's obligation to comply with collective bargaining agreements or employment benefit programs that provide an amount of organ or bone marrow donation leave sufficient to meet the requirements of the law.[339]

Employee Rights to Benefits and Other Protections. An employee's use of this leave cannot constitute a break in the employee's continuous service for purposes of salary adjustments, sick leave, vacation, paid time off, annual leave, seniority, or other employee benefits. Upon return to work from leave, employees are entitled to restoration to the position the employee held when the leave began, or an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.[340]

During any period of organ or bone marrow donation leave, the employer must maintain health benefit plan coverage for the employee for the duration of the leave and in the same manner that coverage would have been provided if the employee were not on leave. For employees working on a commission basis, an employer must pay an employee any commission that becomes due because of work the employee performed before taking leave.[341]

An employer is prohibited from discharging, disciplining, threatening, discriminating against, penalizing, or taking other retaliatory action regarding an employee's compensation, terms, conditions, location, or

[335] VA. CODE ANN. § 40.1-33.7.

[336] VA. CODE ANN. § 40.1-33.8(A).

[337] VA. CODE ANN. § 40.1-33.8(B).

[338] VA. CODE ANN. § 40.1-33.8(C).

[339] VA. CODE ANN. § 40.1-33.8(D).

[340] VA. CODE ANN. § 40.1-33.9.

[341] VA. CODE ANN. § 40.1-33.10.

privileges of employment because the employee has requested or used this leave, or because the employee has alleged a violation of the law.[342]

Enforcement and Penalties. The Commissioner of Labor and Industry ("Commissioner") is charged with enforcement of the provisions of the law. Any person alleging a violation can file a complaint with the Commissioner within one year of the date the person knew or should have known of the alleged violation. The Commissioner must keep such complaints confidential to the maximum extent permitted by law. The Commissioner must investigate the complaint and attempt to resolve it via mediation between the parties, or via other means. The Commissioner must notify employers of alleged violations via certified mail containing a description of the alleged violation, and employers have 15 days to request an informal conference with the Commissioner to discuss the violation.[343]

Employers who knowingly violate the law are subject to a civil penalty of no more than $1,000 for the first violation, of no more $2,500 for the second violation, and of no more than $5,000 for each successive violation. The Commissioner will consider the size of the business and the gravity of the violation in determining the amount of the civil penalty to impose.[344]

3.9(g) *Voting Time*

3.9(g)(i) *Federal Voting Time Guidelines*

There is no federal law concerning time off to vote.

3.9(g)(ii) *State Voting Time Guidelines*

Virginia does not have a law concerning time off to vote.

However, state law affords a leave of absence for employees that serve as election officers, members of a local election board, or deputy general registrars. Such employees must provide "reasonable notice" of their intent to take time off for that purpose, although no further guidance is provided concerning what constitutes reasonable notice. Likewise, it is unclear how much leave an employee who is serving in these capacities may take for such duties in Virginia. However, an employee who serves four or more hours in these capacities—including travel time—cannot be required to start a work shift that commences at or after 5:00 P.M. on the day of service, or begin a shift before 3:00 A.M. the day following the day of service.

While the law is not specific as to whether leave must be paid, an employer cannot require an employee to use sick leave or vacation time during their leave. Moreover, employers cannot discharge, or take adverse action, against an employee who serves in these capacities.[345]

Virginia has designated Election Day, which is the Tuesday following the first Monday in November, as a state legal holiday. The law describes Election Day as a day for the right of citizens of a free society to

[342] VA. CODE ANN. § 40.1-33.11.

[343] VA. CODE ANN. § 40.1-33.12.

[344] VA. CODE ANN. § 40.1-33.12(E).

[345] VA. CODE ANN. § 24.2-119.1.

exercise the right to vote.[346] In addition, the protections afforded to election officers extend to persons who serve as members of a local electoral board, and deputy general registrars.[347]

3.9(h) *Leave to Participate in Political Activities*

3.9(h)(i) *Federal Guidelines on Leave to Participate in Political Activities*

Federal law does not address leave for private-sector employees to participate in political activities.

3.9(h)(ii) *State Guidelines on Leave to Participate in Political Activities*

Virginia law does not address leave for private-sector employees to participate in political activities.

3.9(i) *Leave to Participate in Judicial Proceedings*

3.9(i)(i) *Federal Guidelines on Leave to Participate in Judicial Proceedings*

The Jury System Improvements Act prohibits employers from terminating or disciplining "permanent" employees due to their jury service in federal court.[348] Employers are under no federal statutory obligation to pay employees while serving on a jury.

Employers may verify that an employee's request for civic duty is legally obligated by requiring the employee to produce a copy of the summons, subpoena, or other documentation. Also, an employer can set reasonable advance notice requirements for jury duty leave. Upon completion of jury duty, an employee is entitled to reinstatement.

An employer also may be required to grant leave to employees who are summoned to testify, to assist, or to participate in hearings conducted by federal administrative agencies, as required by a variety of additional federal statutes.[349] For more information, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

3.9(i)(ii) *State Guidelines on Leave to Participate in Judicial Proceedings*

Employers are prohibited from discharging or taking any adverse employment action against any person summoned for jury duty, or summoned or subpoenaed for a court appearance, provided the employee gives the employer reasonable notice.[350] The only exception to this prohibition is for a defendant in a criminal case.

An employee who is absent from employment due to jury duty or a court appearance may not be required to use sick leave or vacation time to cover the absence.[351] Employers are not required to compensate employees for time spent on jury service or in court for prospective jury service. If an employee has served

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[346] VA. CODE ANN. § 2.2-3300.

[347] VA. CODE ANN. § 24.2-119.1.

[348] 28 U.S.C. § 1875.

[349] *See, e.g.*, 29 U.S.C. § 660(c) (Occupational Safety and Health Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); 42 U.S.C. § 2000e 3(a) (Title VII); 29 U.S.C. § 623(d) (Age Discrimination in Employment Act).

[350] VA. CODE ANN. § 18.2-465.1.

[351] VA. CODE ANN. § 18.2-465.1.

four or more hours of jury duty on a particular day, they cannot be required to begin a work shift after 5:00 P.M. following their service or before 3:00 A.M. the next day.[352]

3.9(j) *Leave for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

3.9(j)(i) *Federal Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Federal law does not address leave for private-sector employees who are victims of crime or domestic violence.

3.9(j)(ii) *State Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Employers must permit an employee who has been the victim of a crime to leave work to attend the criminal proceedings relating to the crime.[353] The term *victim* is defined as including any person "who has suffered physical, psychological, or economic harm as a direct result of the commission" of a felony or any of the following: assault and battery, stalking, violation of a protective order, sexual battery, attempted sexual battery, or maiming or driving while intoxicated.[354] *Victim* also includes the spouse or child of such a person, the parent or legal guardian of such a person who is a minor, and the spouse, parent, sibling, or legal guardian of a person who is physically or mentally incapacitated or was the victim of homicide. The protections for *victims* do not cover the parent, child, spouse, sibling, or guardian of an individual who commits a crime against a victim.[355]

Applicable criminal proceedings include any "proceeding at which the victim has the right or opportunity to appear involving a crime against the victim."[356] Criminal proceedings include the suspect's initial appearance and proceedings in which the court will consider sentencing or releasing the individual accused or convicted of the crime, or modifying the terms of the individual's probation. Trial on the merits is not explicitly listed, but attendance of a victim under summons or subpoena would be covered under the separate provisions noted above. Law enforcement agencies will provide victims of crimes with a standardized form listing their rights as a crime victim.[357] An employee requesting victim's leave must provide the employer with a copy of this form and, if applicable, with copies of the notice of each scheduled criminal proceeding provided to the employee as a victim.[358]

Employers need not pay employees who take victim's leave and may limit the leave available if the leave creates an undue hardship on the employer's business. An employer may not, however, terminate or discriminate against an employee who exercises the right to leave under this law.[359]

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[352] VA. CODE ANN. § 18.2-465.1.

[353] VA. CODE ANN. § 40.1-28.7:2.

[354] VA. CODE ANN. § 19.2-11.01(B).

[355] VA. CODE ANN. § 19.2-11.01(B).

[356] VA. CODE ANN. § 40.1-28.7:2.

[357] VA. CODE ANN. § 19.2-11.01(A).

[358] VA. CODE ANN. § 40.1-28.7:2.

[359] VA. CODE ANN. § 40.1-28.7:2.

Virginia does not have separate leave of absence provisions for victims of domestic violence, sexual assault, or stalking. Such individuals would be subject to the same requirements for a leave of absence as set forth above for crime victims in general.

3.9(k) *Military-Related Leave*

3.9(k)(i) *Federal Guidelines on Military-Related Leave*

Two federal statutes primarily govern military-related leave: the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Family and Medical Leave Act (FMLA). For more detailed information on these statutes, including notice and other requirements, see **LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES**.

USERRA. USERRA imposes obligations on all public and private employers to provide employees with leave to "serve" in the "uniformed services." USERRA also requires employers to reinstate employees returning from military leave who meet certain defined qualifications. An employer also may have an obligation to train or otherwise qualify those employees returning from military leave. USERRA guarantees employees a continuation of health benefits for the 24 months of military leave (at the employee's expense) and protects an employee's pension benefits upon return from leave. Finally, USERRA requires that employers not discriminate against an employee because of past, present, or future military obligations, among other things.

Some states provide greater protections for employees with respect to military leave. USERRA, however, establishes a "floor" with respect to the rights and benefits an employer is required to provide to an employee to take leave, return from leave, and be free from discrimination. Any state law that seeks to supersede, nullify, or diminish these rights is void under USERRA.[360]

FMLA. Under the FMLA, eligible employees may take leave for: (1) any "qualifying exigency" arising from the foreign deployment of the employee's spouse, son, daughter, or parent with the armed forces; or (2) to care for a next of kin servicemember with a serious injury or illness (referred to as "military caregiver leave").

1. **Qualifying Exigency Leave.** An eligible employee may take up to 12 weeks of unpaid leave in a single 12-month period if the employee's spouse, child, or parent is an active duty member of one of the U.S. armed forces' reserve components or National Guard, or is a reservist or member of the National Guard who faces recall to active duty if a qualifying exigency exists.[361] An eligible employee may also take leave for a qualifying exigency if a covered family member is a member of the regular armed forces and is on duty, or called to active duty, in a foreign country.[362] Notably, leave is only available for covered relatives of military members called to

[360] USERRA provides that: (1)nothing within USERRA is intended to supersede, nullify, or diminish a right or benefit provided to an employee that is greater than the rights USERRA provides (38 U.S.C. § 4302(a)); and (2) USERRA supersedes any state law that would reduce, limit, or eliminate any right or benefit USERRA provides (38 U.S.C. § 4302(b)).

[361] 29 C.F.R. § 825.126(a).

[362] Deployment of the member with the armed forces to a foreign country means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters. 29 C.F.R. § 825.126(a)(3).

active *federal* service by the president and is not available for those in the armed forces recalled to state service by the governor of the member's respective state.

2. **Military Caregiver Leave.** An eligible employee may take up to 26 weeks of unpaid leave in a single 12-month period to care for a "covered servicemember" with a serious injury or illness if the employee is the servicemember's spouse, child, parent, or next of kin.

3.9(k)(ii) *State Guidelines on Military-Related Leave*

National Guard and Virginia State Defense Force Leave. Virginia State Defense Force members or members of the National Guard of Virginia or any other state who are called to state active duty by the governor are entitled to take leave without pay from a nongovernment job. In addition, the statute requires members of the National Guard of another state to be otherwise employed within the Commonwealth of Virginia in order to use this leave.[363]

Employees cannot be forced to use vacation or other accrued leaves for a period of active service. The choice to use such leave must be solely at the discretion of the employee.[364] Employers must provide employees the option of continuing, at the employee's expense, health care coverage, life insurance, or long-term care insurance if that employee is a member of the Virginia National Guard who is called to state active duty by the governor.[365]

Qualifying members of the state's National Guard, Defense Force, or naval militia that were honorably discharged are entitled to reemployment if they make written application to their previous employer within:

- 14 days of release from duty or hospitalization following release, if the length of the member's absence by reason of service in the uniformed services does not exceed 180 days; or
- 90 days of release from duty or hospitalization following release, if the length of the member's absence by reason of service in the uniformed services exceeds 180 days.

The employee must be restored to the same position the employee held before service. If that position no longer exists, the employee must be reinstated in a position of like seniority, status, and pay, or to a comparable vacant position, unless to do so would be unreasonable.[366]

Civil Air Patrol Leave. Virginia provides a leave entitlement for members of the Civil Air Patrol. Any employee who is a volunteer member of the Civil Air Patrol is entitled to a leave of absence from employment on all days during which the employee is:

- engaged in training for emergency missions with the Civil Air Patrol, not to exceed 10 workdays per federal fiscal year; or
- responding to an emergency mission as a Civil Air Patrol volunteer, not to exceed 30 workdays per federal fiscal year.[367]

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[363] VA. CODE ANN. § 44-93.2.

[364] VA. CODE ANN. § 44-93.2.

[365] VA. CODE ANN. § 44-102.1.

[366] VA. CODE ANN. § 44-93.3.

[367] VA. CODE ANN. § 40.1-28.7:6.

An employer may treat the leave of absence as unpaid leave, but nothing in the statute should be construed to prevent an employer from providing paid leave. The employer cannot require an employee to exhaust any other leave to which the employee is entitled prior to taking Civil Air Patrol leave. The employee is entitled to take leave without loss of seniority, accrued leave, benefits, or efficiency rating.[368]

An employee requesting leave must provide documentation to their employer to support the request for leave:

- certification that the employee has been authorized by the United States Air Force, the Governor, or a department, division, agency, or political subdivision of the state to respond to or train for an emergency mission; and
- verification from the Civil Air Patrol of the emergency need of the employee's volunteer service.[369]

Other Military-Related Protections: Spousal Unemployment. For purposes of unemployment benefits, good cause for leaving employment may exist if an employee voluntarily leaves a job to accompany the employee's spouse if: (1) that spouse "is on active duty in the military or naval services of the United States;" and (2) the relocation stems from "a new military-related assignment . . . pursuant to a permanent change of duty order" to a location where the employee's place of employment is not reasonably accessible.[370] In addition, this good cause provision applies only if the state to which the spouse is transferred has a similar provision, unless the transfer involves members of the Virginia National Guard relocated within the Commonwealth. In such circumstances, benefits paid to qualifying claimants will be charged to the pool and not to an employer's account.[371]

Moreover, an employer's account will not be charged if "an individual hired to replace a member of the Reserve of the United States Armed Forces or the National Guard called into active duty in connection with an international conflict" is terminated because of that member's return from active duty.[372]

3.9(l) *Other Leaves*

3.9(l)(i) *Federal Guidelines on Other Leaves*

There are no federal statutory requirements for other categories of leave for private-sector employees.

3.9(l)(ii) *State Guidelines on Other Leaves*

There are no statutory requirements for other categories of leave for private-sector employees in Virginia.

[368] VA. CODE ANN. § 40.1-28.7:6.

[369] VA. CODE ANN. § 40.1-28.7:6.

[370] VA. CODE ANN. §§ 60.2-528, 60.2-618.

[371] VA. CODE ANN. §§ 60.2-528, 60.2-618.

[372] VA. CODE ANN. § 60.2-528(C)(5).

3.10 Workplace Safety

3.10(a) *Occupational Safety and Health*

3.10(a)(i) *Fed-OSH Act Guidelines*

The federal Occupational Safety and Health Act ("Fed-OSH Act") requires every employer to keep their places of employment safe and free from recognized hazards likely to cause death or serious harm to employees.[373] Employers are also required to comply with all applicable occupational safety and health standards.[374] To enforce these standards, the federal Occupational Safety and Health Administration ("Fed-OSHA") is authorized to carry out workplace inspections and investigations and to issue citations and assess penalties. The Fed-OSH Act also requires employers to adopt reporting and record-keeping requirements related to workplace accidents. For more information on this topic, see LITTLER ON WORKPLACE SAFETY.

Note that the Fed-OSH Act encourages states to enact their own state safety and health plans. Among the criteria for state plan approval is the requirement that the state plan provide for the development and enforcement of state standards that are at least as effective in providing workplace protection as are comparable standards under the federal law.[375] Some state plans, however, are more comprehensive than the federal program or otherwise differ from the Fed-OSH Act.

3.10(a)(ii) *State-OSH Act Guidelines*

Virginia, under agreement with Fed-OSHA, operates its own state occupational safety and health program in accordance with section 18 of the Fed-OSH Act.[376] Thus, Virginia is a so-called "state plan" jurisdiction, with its own detailed rules for occupational safety and health that parallel, but are separate from, Fed-OSHA standards. The Virginia Occupational Safety and Health (VOSH) Division of the Department of Labor and Industry enforces Virginia's safety and health laws. Like the Fed-OSHA, the VOSH imposes various obligations on covered employers.

In addition to the state's occupational safety and health plan, Virginia has enacted several Safety Provisions, which specify certain rights and duties of employers and employees, as well as procedures for inspections, citations, and appeals.[377] In addition, VOSH regulations provide useful information, such as an index of hazardous occupations for minors under 18 years of age.[378]

Rights & Duties of Employers. In Virginia, employers have a duty to "furnish to each of [its] employees safe employment and a place of employment that is free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees and to comply with all applicable occupational safety and health rules and regulations promulgated under this title."[379] These include, by

[373] 29 U.S.C. § 654(a)(1). An *employer* is defined as "a person engaged in a business affecting commerce that has employees." 29 U.S.C. § 652(5). The definition of employer does not include federal or state agencies (except for the U.S. House of Representatives and Senate). Under some state plans, however, state agencies may be subject to the state safety and health plan.

[374] 29 U.S.C. § 654(a)(2).

[375] 29 U.S.C. § 667(c)(2).

[376] 29 U.S.C. § 667.

[377] VA. CODE ANN. §§ 40.1-44.1 to 40.1-51.4:5.

[378] 16 VA. ADMIN. CODE § 15-30-20.

[379] VA. CODE ANN. § 40.1-51.1(A).

virtue of their incorporation of Fed-OSHA standards, a large number of regulations that involve the control of hazardous energy and other safety requirements, as well as exposure to a wide variety of toxic substances and harmful physical agents. Some of these compliance obligations pertain to an employer's duty to furnish its employees with certain information, and to post specific notices relating to occupational health and safety.

For instance, employers must inform employees of their rights and obligations regarding workplace safety and health via notice, posting, or other means. They must also inform employees about workplace exposure to toxic materials or other harmful physical agents that are in excess of specified levels. In such cases, employers must also provide employees with the results of any monitoring done on the premises, and of any corrective actions taken or planned. Employers are obligated to post any citation issued by VOSH against the company at the site of the violation that gave rise to the citation. Finally, employers must inform the Virginia Department of Labor and Industry within eight hours of any accident that occurs on its premises that results in the death of one or more persons or the in-patient hospitalization of three or more persons.

Rights & Duties of Employees. Under Virginia's safety and health laws, employees have duties as well as rights. Employees, like employers, are obligated to comply with all aspects of the safety and health regulations.[380] This obligation includes complying with safety and health standards as well as cooperating with VOSH enforcement efforts. Employees may bring suspected safety and health violations to the attention of their employer and/or the Commissioner of Labor and Industry. A representative of the employees must be given the opportunity to accompany an inspector on any resulting physical inspection of the workplace.

Employers are prohibited from discharging, or in any way discriminating against, an employee for exercising their rights under the workplace safety and health laws.[381] An employee may complain to the commissioner about an infringement of their rights in this regard within 60 days after an alleged violation occurs.[382] An employee who fails to file a complaint within the 60-day period cannot seek relief. If, after investigation, the commissioner determines that the employee has been discharged or discriminated against, the commissioner shall attempt by conciliation to have the violation abetted without economic loss to the employee. If conciliation fails, the commissioner shall bring an action in a Virginia circuit court on the employee's behalf to seek an appropriate remedy. If the commissioner declines to issue a charge against the employer, or other alleged discriminator, the aggrieved employee may bring an action in circuit court. However, an employee must first exhaust their administrative remedies through application to the commissioner before they may seek relief from the courts.[383]

State Enforcement, Remedies & Penalties. Virginia's workplace health and safety laws are enforced by VOSH. Virginia's Safety and Health Codes Board is authorized to adopt, alter, amend, and repeal rules and regulations in an effort to comply with Fed-OSHA and Virginia's workplace safety and health provisions.[384] The Commissioner of Health is charged with enforcing these rules and regulations. Enforcement is carried out through inspections obtained with either the consent of the employer or a warrant (issued only for probable cause) to conduct a physical inspection of the employer's workplace or the employer's health

[380] VA. CODE ANN. § 40.1-51.2(A).

[381] VA. CODE ANN. § 40.1-51.2:1.

[382] VA. CODE ANN. § 40.1-51.2:2(A).

[383] *Nelson v. United States Postal Serv.*, 189 F. Supp. 2d 450, 460 (W.D. Va. 2002).

[384] VA. CODE ANN. § 40.1-22.

and safety records.[385] Employers are permitted to accompany officials on all such safety and health inspections.[386] Inspectors are required to preserve the confidentiality of all trade secrets that may be revealed to them during the course of an inspection.[387]

The penalties for violations are based on the size of the employer's business, the gravity of the violation, the employer's good faith efforts to comply with the statute, and any history of previous violations.[388] The commissioner cannot issue citations more than six months after any alleged violation has occurred.[389] Consequently, employers may use this limitation as a defense to citations issued after that time period. Because the statute is remedial in nature and will be construed liberally by the courts, employers may also consider, where appropriate, pleading that the delay in issuing the citation prejudiced the employer.

Citations, penalties, and other determinations by VOSH administrators may be contested in writing to the commissioner within 15 business days after receipt.[390] The commissioner is required to immediately notify the Commonwealth's attorney for the jurisdiction wherein the violation is alleged to have occurred and to file a bill of complaint in circuit court.[391] However, there is no statute of limitations for bringing an action against the employer. At least one court has held that a 15-month delay in bringing a bill of complaint against an employer, after receiving the notice of contest, was reasonable, particularly because the employer did not demonstrate prejudice from the delay.[392]

The commissioner may meet their burden of demonstrating a "serious violation" of the occupational safety or health regulations by showing that the employer should have known of the violation had it exercised reasonable diligence.[393] The employer may defend a claim by proving that the violation was caused by an isolated, idiosyncratic act of an employee, but the burden of proving this affirmative defense is on the employer.

3.10(b) *Cell Phone & Texting While Driving Prohibitions*

3.10(b)(i) *Federal Guidelines on Cell Phone & Texting While Driving*

Federal law does not address cell phone use or texting while driving.

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385 VA. CODE ANN. §§ 40.1-49.8, 40.1-49.9.

386 VA. CODE ANN. § 40.1-51.1(F).

387 VA. CODE ANN. § 40.1-51.4:1.

388 VA. CODE ANN. § 40.1-49.4(A)(4)(a).

389 VA. CODE ANN. § 40.1-49.4(A)(3).

390 VA. CODE ANN. § 40.1-49.4(A)(4)(b).

391 VA. CODE ANN. § 40.1-49.4(E).

392 *Barr v. S.W. Rodgers Co., Inc.*, 537 S.E.2d 620, 624 (Va. Ct. App. 2000); *see also Davenport v. English Constr. Co., Inc.*, 66 Va. Cir. 77, 81 (Va. Cir. Ct. 2004) (absent a showing of actual prejudice, 34-month delay in filing complaint was acceptable); *Davenport v. Thor, Inc.*, 62 Va. Cir. 237, 238 (Va. Cir. Ct. 2003) (absent a showing of actual prejudice, 33-month delay in filing complaint was acceptable); *cf. Davenport v. Thor, Inc.*, 62 Va. Cir. 228, 230 (Va. Cir. Ct. 2003) (complaint dismissed because there was no excuse for the 40-month delay).

393 *Magco of Md., Inc. v. Barr*, 531 S.E.2d 614, 617-18 (Va. Ct. App. 2000), *aff'd*, 545 S.E.2d 548 (Va. 2001); *see also Fairfax Cnty. Dep't of Pub. Works & Envtl. Servs. v. Davenport*, 2009 WL 4908563, at **5-9 (Va. Ct. App. Dec. 22, 2009) (applying "knew or should have known" standard in upholding the circuit court's finding that the commissioner met his burden of proving the employer's knowledge).

3.10(b)(ii) *State Guidelines on Cell Phone & Texting While Driving*

Virginia law prohibits any person from holding a handheld personal communication device while driving. The law provides for the following exceptions:

- the operator of any emergency vehicle while engaged in the performance of official duties;
- a driver who is lawfully parked or stopped;
- any person using a handheld personal communications device to report an emergency;
- the use of an amateur or a citizens band radio; or
- the operator of any Department of Transportation vehicle during the performance of traffic incident management services.[394]

Drivers of commercial motor vehicles are also prohibited from texting or using a handheld mobile telephone while driving such vehicles.[395] These prohibitions apply to employees driving for work purposes and could expose an employer to liability. Employers therefore should be cognizant of, and encourage compliance with, the restrictions.

3.10(c) *Firearms in the Workplace*

3.10(c)(i) *Federal Guidelines on Firearms on Employer Property*

Federal law does not address firearms in the workplace.

3.10(c)(ii) *State Guidelines on Firearms on Employer Property*

Under Virginia law, a concealed handgun permit does not authorize the possession of any handgun or other weapon on property or in places where such possession is prohibited by the owner of private property.[396] Thus, an employer may prohibit the possession of concealed handguns on its work premises through an internal policy for employees as well as by posting signs on the premises applicable to the public.

3.10(d) *Smoking in the Workplace*

3.10(d)(i) *Federal Guidelines on Smoking in the Workplace*

Federal law does not address smoking in the workplace.

3.10(d)(ii) *State Guidelines on Smoking in the Workplace*

The Virginia Indoor Clean Air Act (VICAA) prohibits smoking in restaurants and restaurant restrooms, with limited exceptions.[397] The VICAA further requires that certain retail establishments, health care facilities, educational facilities (except for public elementary, intermediate, and secondary schools), and recreational facilities must provide reasonable no-smoking areas based upon the use and size of the building.[398] Additionally, the VICAA includes specific prohibitions and restrictions with respect to elevators, public schools, health care and child care facilities, polling rooms, indoor service lines and

[394] VA. CODE ANN. § 46.2- 818.2.

[395] VA. CODE ANN. § 46.2-341.20:5.

[396] VA. CODE ANN. § 18.2-308.01(C).

[397] VA. CODE ANN. § 15.2-2825.

[398] VA. CODE ANN. §§ 15.2-2823, 15.2-2826.

cashier lines, and public restrooms.[399] "No Smoking" signs must be posted on premises where smoking is prohibited.[400] The VICAA provides localities with limited authority to regulate smoking in the workplace through local ordinances.[401]

3.10(e) *Suitable Seating for Employees*

3.10(e)(i) *Federal Guidelines on Suitable Seating for Employees*

Federal law does not address suitable seating requirements for employees.

3.10(e)(ii) *State Guidelines on Suitable Seating for Employees*

Virginia law does not address suitable seating requirements for employees.

3.10(f) *Workplace Violence Protection Orders*

3.10(f)(i) *Federal Guidelines on Workplace Violence Protection Orders*

Federal law does not address employer workplace violence protection orders. That is, there is no federal statute addressing whether or how employers might obtain a legal order (such as a temporary restraining order) on their own behalf, or on behalf of their employees or visitors, to protect against workplace violence, threats, or harassment.

3.10(f)(ii) *State Guidelines on Workplace Violence Protection Orders*

Virginia law does not address employer workplace violence protection orders.

3.11 Discrimination, Retaliation & Harassment

3.11(a) *Protected Classes & Other Fair Employment Practices Protections*

3.11(a)(i) *Federal FEP Protections*

The federal equal employment opportunity laws that apply to most employers include: (1) Title VII of the Civil Rights Act of 1964 ("Title VII");[402] (2) the Americans with Disabilities Act (ADA);[403] (3) the Age Discrimination in Employment Act (ADEA);[404] (4) the Equal Pay Act;[405] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[406] (6) the Civil Rights Acts of 1866 and 1871;[407] and (7) the Civil Rights Act of 1991. As a result of these laws, federal law prohibits discrimination in employment on the basis of:

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399 VA. CODE ANN. § 15.2-2824.

400 VA. CODE ANN. § 15.2-2826.

401 VA. CODE ANN. § 15.2-2828.

402 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

403 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

404 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

405 29 U.S.C. § 206(d). Since the Equal Pay Act is part of the FLSA, the Equal Pay Act applies to employers covered by the FLSA. *See* 29 U.S.C. § 203.

406 42 U.S.C. §§ 2000ff *et seq*. GINA applies to employers with 15 or more employees. 42 U.S.C. § 2000ff (refers to 42 U.S.C. § 2000e(f)).

407 42 U.S.C. §§ 1981, 1983.

- race;
- color;
- national origin (includes ancestry);
- religion;
- sex (includes pregnancy, childbirth, or related medical conditions, and pursuant to the U.S. Supreme Court's decision in *Bostock v. Clayton County, Georgia*, includes sexual orientation and gender identity);[408]
- disability (includes having a "record of" an impairment or being "regarded as" having an impairment);
- age (40); or
- genetic information.

The Equal Employment Opportunity Commission (EEOC) is the agency charged with handling claims under the antidiscrimination statutes.[409] Employees must first exhaust their administrative remedies by filing a complaint within 180 days—unless a charge is covered by state or local antidiscrimination law, in which case the time is extended to 300 days.[410]

3.11(a)(ii) *State FEP Protections*

The Virginia Human Rights Act (VHRA) prohibits discrimination on the basis of:

- race (include discrimination because of or on the basis of traits historically associated with race, including hair texture, hair type, and protective hairstyles such as braids, locks, and twists);
- color;
- religion (the definition of religion includes all aspects of religious observance, practice, or belief);
- national origin;
- sex;
- pregnancy;
- childbirth, or related medical conditions (includes lactation);
- age (40+);
- military status;
- marital status;

[408] 140 S. Ct. 1731 (2020). For a discussion of this case, see LITTLER ON DISCRIMINATION IN THE WORKPLACE: RACE, NATIONAL ORIGIN, SEX, AGE & GENETIC INFORMATION.

[409] The EEOC's website is available at http://www.eeoc.gov/.

[410] 29 C.F.R. § 1601.13. Note that for ADEA charges, only state laws extend the filing limit to 300 days. 29 C.F.R. § 1626.7.

- disability;
- sexual orientation (actual or perceived heterosexuality, bisexuality, or homosexuality);
- gender identity (gender related identity, appearance, or other gender related characteristics of an individual with or without regard to the individual's designated sex at birth);[411] and
- **effective July 1, 2024:** ethnic origin.

The Virginia Human Rights Act includes disability as a protected class within the act. The act makes it an unlawful discriminatory practice for an employer with more than five employees to refuse to provide reasonable accommodations for an otherwise qualified person with a disability unless it would result in undue hardship for the employer to do so.[412]

Under the statute, military status includes status as a member of the uniformed services of the United States, or the armed forces reserves, a veteran, or a dependent. The term *dependent* means the spouse, child, or an individual for whom the service member provided more than one half of their support for 180 days immediately before an application for relief under federal law.[413]

The VHRA is generally applicable to all Virginia employers.[414] For employment discrimination purposes, it applies to all employers employing more than 15 employees. For purposes of unlawful discharge on the basis of race, color, religion, national origin, veteran status, sex, sexual orientation, gender identity, marital status, disability, pregnancy, childbirth, or related medical conditions including lactation, however, an employer means an employer employing more than five employees or one or more domestic workers. With respect to unlawful discharge due to age discrimination, the law covers employers with six to 19 employees.[415] Disability discrimination is also redressable under the Virginians With Disabilities Act.[416]

In addition, sponsors of registered apprenticeship programs are prohibited from discriminating against an apprentice or an applicant for an apprenticeship program, on the basis of race, color, national origin, sex, sexual orientation, age, genetic information, disability, religion, pregnancy, childbirth or related medical conditions, military status, gender identity, and age if the individual is 40 years of age or older.[417]

3.11(a)(iii) *State Enforcement Agency & Civil Enforcement Procedures*

Agency Enforcement. Complaints alleging violations of the VHRA may be filed with the Office of Civil Rights of the Department of Law ("Office").[418] Under the VHRA, a plaintiff is also limited to 300 days in which to file a complaint with the Office.[419] The Office has authority to conduct investigations, seek conciliation, refer complaints to another agency, hold hearings, and make findings and recommendations in response to complaints alleging discrimination under the VHRA.[420] If the Office finds reasonable cause

[411] VA. CODE ANN. §§ 2.2-3900 to 2.2-3902.

[412] VA. CODE ANN. §§ 2.2-3905.1

[413] VA. CODE ANN. §§2.2.3901.

[414] VA. CODE ANN. § 2.2-3900.

[415] VA. CODE ANN. § 2.2-3905.

[416] VA. CODE ANN. § 2.2-3900(B)(1).

[417] VA. CODE ANN. §§ 40.1-120.1; 40.1-121 (effective July 1, 2023, § 2.2-2048).

[418] VA. CODE ANN. §§ 2.2-3902, 2.2-520.

[419] VA. CODE ANN. § 2.2-3907.

[420] VA. CODE ANN. §§ 2.2-3902, 2.2-520.

to believe that discrimination has occurred, the attorney general may apply to the circuit court for a subpoena to obtain the employer's personnel records and related information.[421] The Office may seek prevention of or relief from an alleged unlawful discriminatory practice through appropriate enforcement authorities.[422]

The Office is also significant for purposes of claims brought under Title VII, which prohibits many of the same forms of discrimination as the VHRA. Because of its authority to seek relief from employment practices made unlawful under that federal law, the Office is a "deferral agency" under Title VII.[423] Virginia is therefore a deferral state, and employees bringing suit under Title VII must first exhaust their state remedies by filing a claim with the Office.[424]

Relatedly, because the Office is a deferral agency, discrimination claims under Title VII may be allowed a 300-day filing period rather than the normal 180-day federal limitations period.[425] An employee who files a charge after 180 days, however, does so at their own peril. Such a charge will be timely only if the EEOC chooses to refer the claim to the Office.[426] In the absence of such a referral, the employee's claim is subject to the shorter 180-day limitations period.

Exclusivity of Remedy. As discussed above, a private right of action exists only in the case of an alleged discriminatory discharge. In the event that a violation of the VHRA is proved, a court may award compensatory and punitive damages, reasonable attorneys' fees and costs, injunctive relief, a temporary restraining order, or any other order.[427]

An employee or applicant who has been denied any of the rights afforded pursuant to pregnancy, childbirth and related medical conditions can bring an action in a general district or circuit court having jurisdiction over the employer that allegedly denied such rights. Any such action must be brought within two years from the date of the unlawful denial of rights, or, if the employee or applicant has filed a complaint with the Office of Civil Rights of the Department of Law or a local human rights or human relations agency or commission within two years of the denial of rights, the action must be brought within 90 days from the date that the Division or a local human rights or human relations agency or commission has rendered a final disposition on the complaint.

If a court or jury finds for the plaintiff, the court or jury may award to the plaintiff, as the prevailing party, compensatory damages, back pay, and other equitable relief. The court may also award reasonable attorney fees and costs and may grant as relief any permanent or temporary injunction, temporary restraining order, or other order, including an order enjoining the defendant from engaging in such practice, or order such affirmative action as may be appropriate.[428]

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[421] VA. CODE ANN. § 2.2-521.

[422] VA. CODE ANN. § 2.2-520(B)(4).

[423] *See, e.g.*, *Edelman v. Lynchburg Coll.*, 535 U.S. 106 (2002); *Puryear v. County of Roanoke*, 214 F.3d 514, 517 (4th Cir. 2000).

[424] *See McIntyre-Handy v. West Telemarketing Corp.*, 97 F. Supp. 2d 718, 725 (E.D. Va. 2000), *aff'd*, 238 F.3d 413 (4th Cir. 2000).

[425] *See Edelman*, 535 U.S. at n.1.

[426] *Meyer v. Bell Atl. Network Servs.*, 57 F. Supp. 2d 303, 307 (E.D. Va. 1999).

[427] VA. CODE ANN. § 2.2-3908.

[428] VA. CODE ANN. § 2.2-3909.

3.11(a)(iv) *Additional Discrimination Protections*

Genetic Testing or Characteristics. Virginia also protects individuals from discrimination in employment on the basis of genetic testing or the results thereof. Employers are banned from requesting, requiring, soliciting, or administering a genetic test as a condition of employment.[429] It is unlawful for employers to take adverse actions—*i.e.*, refuse to hire, fail to promote, or discharge—against employees or applicants "solely on the basis of a genetic characteristic . . . or the results of a genetic test" no matter how such information is acquired.[430] Aggrieved employees may fail suit against an employer within 180 days of the allegedly illegal adverse action. Successful plaintiffs may recover actual or punitive damages, injunctive relief, and back pay.[431]

Military Status. Virginia also protects members of the Virginia Defense Force and members of the National Guard of Virginia or of another state from discrimination in employment under certain circumstances. Such an individual "who performs, has performed, applies to perform, or has an obligation to perform state active duty or military duty pursuant to Title 32 of the United States Code" cannot be "denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation."[432] An employer will be deemed to have violated this law if the individual membership or obligation for service "is a motivating factor in the employer's action, unless the employer can prove by the greater weight of the evidence that the same unfavorable action would have taken place in the absence of the member's" status or obligation.[433]

3.11(a)(v) *Local FEP Protections*

In addition to the federal and state laws, employers with operations in Alexandria, Arlington County, Fairfax County, and Newport News are subject to local fair employment practices ordinances.

- **Alexandria.** Protected classifications include: race; color; sex; religion; ancestry; national origin; marital status; age (40 years or older); sexual orientation; and disability. The antidiscrimination protections apply to any person employing four or more employees for wages, salaries, or commission within the city of Alexandria, exclusive of parents, spouse, or children, and excluding any *bona fide* religious, fraternal or sectarian organization not supported in whole or in part by governmental appropriations.[434] An aggrieved individual may file a written complaint with the City of Alexandria Human Rights Commission within 300 days after the date of the actions or conduct alleged to be in violation of the provisions.[435]
- **Arlington County.** Employers within Arlington County that employ wages, salaries, or on commission four or more persons who are not related to the employer (if an individual), or to any partner or majority shareholder of the employer (if a partnership or a corporation), and

[429] VA. CODE ANN. § 40.1-28.7:1(A)(1); *see also* VA. CODE ANN. § 38.2-508.4 (defining *genetic characteristic* and *genetic test*).

[430] VA. CODE ANN. § 40.1-28.7:1(A)(2).

[431] VA. CODE ANN. § 40.1-28.7:1(B).

[432] VA. CODE ANN. § 44-93.4(A).

[433] VA. CODE ANN. § 44-93.4(B).

[434] ALEXANDRIA, VA., CODE OF ORDINANCES §§ 12-4-3, 12-4-5 (exceptions, including *bona fide* occupational qualifications and employment practices based on state or federal laws or regulations).

[435] Alexandria, Va., Code of Ordinances § 12-4-16.

who are not employed in domestic service in the employer's personal residence are subject to the following antidiscrimination protections: race; color; religion; sex (includes sexual harassment, discrimination based on pregnancy, childbirth, or related medical conditions); sexual orientation; marital status; national origin; handicap; and age (at least 40 years).[436] An individual alleging a violation of the ordinance may file a written complaint with the Arlington Human Right Commission within 180 days.[437] Any person aggrieved by a discriminatory act under the provisions may bring an appropriate action in court for damages, redress of injury, or injunctive relief. Nothing in the ordinance prevents any person from exercising any right or seeking any remedy to which they might otherwise be entitled, nor is any person required to pursue any remedy under the ordinance as a condition of seeking relief from any court or other agency, except as is otherwise provided by applicable state or federal laws.[438]

- **Fairfax County.** Protected classifications include: age (at least 40 years); race; color; religion; sex (includes pregnancy, childbirth, and related conditions); national origin; marital status; and disability. The antidiscrimination protections apply to employers within Fairfax County that, in exchange for wages, salaries, commission, or other benefits, employ four or more persons who are not family members to the employer (if an individual), or to any partner or majority shareholder of the employer (if a partnership or a corporation), and who are not employed in domestic service in the employer's personal residence.[439] An individual alleging a violation of the ordinance may file a written complaint with the Fairfax Human Rights Commission within one year of when the complainant knew or should have known that the alleged violation had ceased.[440] Any person aggrieved by a discriminatory act under the provisions may bring an appropriate action in court for damages, redress of injury, or injunctive relief. Nothing in the ordinance prevents any person from exercising any right or seeking any remedy to which they might otherwise be entitled, nor is any person required to pursue any remedy under the ordinance as a condition of seeking relief from any court or other agency, except as is otherwise provided by applicable state or federal laws.[441]
- **Newport News.** Protected classifications include: race; color; religion; national origin; sex; age; marital status; and disability.[442] The ordinance does not provide a definition of employer. An aggrieved individual may file a written complaint with the Newport News Human Rights Commission within 180 days of the alleged discriminatory event.[443]

3.11(b) *Equal Pay Protections*

3.11(b)(i) *Federal Guidelines on Equal Pay Protections*

The Equal Pay Act requires employers to pay male and female employees equal wages for substantially equal jobs. Specifically, the law prohibits employers covered under the federal Fair Labor Standards Act (FLSA) from discriminating between employees within the same establishment on the basis of sex by

[436] ARLINGTON CNTY., VA., CODE §§ 31-2, 31-3(B), and 31-9 (exemptions, including for religious organizations).

[437] ARLINGTON CNTY., VA., CODE §§ 31-7, 31-15.

[438] ARLINGTON CNTY., VA., CODE § 31-13.

[439] FAIRFAX, VA., CODE OF ORDINANCES §§ 11-1-2, 11-1-5 (includes exemptions).

[440] FAIRFAX, VA., CODE OF ORDINANCES §§ 11-1-13, 11-1-22.

[441] FAIRFAX, VA., CODE OF ORDINANCES § 11-1-20.

[442] NEWPORT NEWS, VA., CODE OF ORDINANCES §§ 21.1-1, 21.1-2, and 21.1-3.

[443] NEWPORT NEWS, VA., CODE OF ORDINANCES §§ 21.1-6, 21.1-8.

paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs—"the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[444] The prohibition does not apply to payments made under: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on a factor other than sex.

An employee alleging a violation of the Equal Pay Act must first exhaust administrative remedies by filing a complaint with the EEOC within 180 days of the alleged unlawful employment practice. Under the federal Lilly Ledbetter Fair Pay Act of 2009, for purposes of the statute of limitations for a claim arising under the Equal Pay Act, an unlawful employment practice occurs with respect to discrimination in compensation when: (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to such a decision or practice; or (3) an individual is affected by application of such decision or practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[445]

3.11(b)(ii) *State Guidelines on Equal Pay Protections*

Virginia law requires equal pay irrespective of sex.[446] The statute prohibits an employer from paying employees at a rate less than that at which it pays employees of the opposite sex for work requiring "equal skill, effort, and responsibility, and which is performed under similar working conditions."[447] Exceptions to this rule involve pay discrepancies associated with merit systems, seniority systems, systems that measure earnings by quality or quantity of production, or a differential based on any other factor other than sex.

Note that Virginia's equal pay statute does not apply to employers covered by the federal Fair Labor Standards Act.[448] The statute also does not apply to claims alleging discriminatory discharge on the basis of sex discrimination.[449] Rather, these laws only apply to discrimination resulting in unequal pay.

An employee alleging a violation of the equal pay laws may file a civil action within two years of the alleged violation.[450]

3.11(c) *Pregnancy Accommodation*

3.11(c)(i) *Federal Guidelines on Pregnancy Accommodation*

As discussed in **3.9(c)(i)**, the federal Pregnancy Discrimination Act (PDA), which amended Title VII, the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA) may be implicated in determining the extent to which an employer is required to accommodate an employee's pregnancy, childbirth, or related medical conditions.

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444 29 U.S.C. § 206(d)(1).

445 42 U.S.C. § 2000e-5.

446 VA. CODE ANN. § 40.1-28.6.

447 VA. CODE ANN. § 40.1-28.6.

448 VA. CODE ANN. § 40.1-28.6.

449 *Barlow v. AVCO Corp.*, 527 F. Supp. 269, 272 (E.D. Va. 1981).

450 VA. CODE ANN. § 40.1-28.6.

Additionally, the Pregnant Workers Fairness Act (PWFA) makes it an unlawful employment practice for an employer of 15 or more employees to:

- fail or refuse to make reasonable accommodations for the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on its business operations;
- require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process;
- deny employment opportunities to a qualified employee, if the denial is based on the employer's need to make reasonable accommodations for the qualified employee;
- require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided; or
- take adverse action related to the terms, conditions, or privileges of employment against a qualified employee because the employee requested or used a reasonable accommodation.[451]

A *reasonable accommodation* is any change or adjustment to a job, work environment, or the way things are usually done that would allow an individual with a disability to apply for a job, perform job functions, or enjoy equal access to benefits available to other employees. Reasonable accommodation includes:

- modifications to the job application process that allow a qualified applicant with a known limitation under the PWFA to be considered for the position;
- modifications to the work environment, or to the circumstances under which the position is customarily performed;
- modifications that enable an employee to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without known limitations; or
- temporary suspension of an employee's essential job function(s).[452]

The PWFA also provides for reasonable accommodations related to lactation, as described in **3.4(a)(iii)**.

An employee seeking a reasonable accommodation must request an accommodation.[453] To request a reasonable accommodation, the employee or the employee's representative need only communicate to the employer that the employee needs an adjustment or change at work due to their limitation resulting from a physical or mental condition related to pregnancy, childbirth, or related medical conditions. The employee must also participate in a timely, good faith interactive process with the employer to determine an effective reasonable accommodation.[454] An employee is not required to accept an accommodation. However, if the employee rejects a reasonable accommodation, and, as a result of that rejection, cannot

[451] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

[452] 29 C.F.R. § 1636.3.

[453] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

[454] 29 C.F.R. § 1636.3.

perform (or apply to perform) an essential function of the position, the employee will not be considered "qualified."[455]

An employer is not required to seek documentation from an employee to support the employee's request for accommodation but may do so when it is reasonable under the circumstances for the employer to determine whether the employee has a limitation within the meaning of the PWFA and needs an adjustment or change at work due to the limitation.

Reasonable accommodation is not required if providing the accommodation would impose an undue hardship on the employer's business operations. An *undue hardship* is an action that fundamentally alters the nature or operation of the business or is unduly costly, extensive, substantial, or disruptive. When determining whether an accommodation would impose an undue hardship, the following factors are considered:

- the nature and net cost of the accommodation;
- the overall financial resources of the employer;
- the number of employees employed by the employer;
- the number, type, and location of the employer's facilities; and
- the employer's operations, including:
  - the composition, structure, and functions of the workforce; and
  - the geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.[456]

The following modifications do not impose an undue hardship under the PWFA when they are requested as workplace accommodations by a pregnant employee:

- allowing an employee to carry or keep water near and drink, as needed;
- allowing an employee to take additional restroom breaks, as needed;
- allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and
- allowing an employee to take breaks to eat and drink, as needed.[457]

The PWFA expressly states that it does not limit or preempt the effectiveness of state-level pregnancy accommodation laws. State pregnancy accommodation laws are often specific in terms of outlining an employer's obligations and listing reasonable accommodations that an employer should consider if they do not cause an undue hardship on the employer's business.

Where a state law focuses primarily on providing job-protected leave for pregnancy or childbirth—as opposed to a pregnancy accommodation—it is discussed in **3.9(c)(ii)**. For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

[455] 29 C.F.R. § 1636.4.

[456] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

[457] 29 C.F.R. § 1636.3.

3.11(c)(ii) *State Guidelines on Pregnancy Accommodation*

The Virginia Human Rights Act makes it an unlawful employment practice for employers of five or more employees to:

- fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment on the basis of pregnancy, childbirth, or related medical conditions;
- refuse to make reasonable accommodation to the known limitations of a person related to pregnancy, childbirth, or related medical conditions, unless the employer can demonstrate that the accommodation would impose an undue hardship;
- deny employment or promotion opportunities to an otherwise qualified applicant or employee because the employer will be required to make reasonable accommodation to the known limitations of the applicant or employee related to pregnancy, childbirth, or related medical conditions;
- take adverse action against an employee who requests or uses a reasonable accommodation, including failure to reinstate any such employee to her previous position or an equivalent position with equivalent pay, seniority, and other benefits when her need for a reasonable accommodation ceases; and
- require an employee to take leave if another reasonable accommodation can be provided to the known limitations related to the employee's pregnancy, childbirth, or related medical conditions.[458]

Reasonable accommodation is not required if providing accommodation would impose an undue hardship on the employer. The following factors will be considered: hardship on the conduct of the employer's business, considering the nature of the employer's operation, including composition and structure of the employer's workforce; the size of the facility where employment occurs; and the nature and cost of the accommodations needed. The fact that the employer provides or would be required to provide a similar accommodation to other classes of employees creates a rebuttable presumption that the accommodation does not impose an undue hardship on the employer.[459]

Reasonable accommodations include:

- more frequent or longer bathroom breaks;
- breaks to express breast milk;
- access to a private location other than a bathroom for the expression of breast milk;
- acquisition or modification of equipment or access to or modification of employee seating;
- a temporary transfer to a less strenuous or hazardous position;
- assistance with manual labor;
- job restructuring;

[458] VA. CODE ANN. § 2.2-3904.

[459] VA. CODE ANN. § 2.2-3904.

- a modified work schedule;
- light duty assignments; and
- leave to recover from childbirth.[460]

The employer must engage in a timely, good faith interactive process with an employee who has requested an accommodation to determine if the requested accommodation is reasonable and, if the accommodation is determined not to be reasonable, discuss alternative accommodations that may be provided.[461]

The Virginia Human Rights Act also requires that affected by pregnancy, childbirth or related medical conditions must be treated the same for all purposes as persons not so affected but similar in their abilities or disabilities, particularly with respect to leave; therefore, the law is also discussed in **3.9(c)(ii)**.

3.11(d) *Harassment Prevention Training & Education Requirements*

3.11(d)(i) *Federal Guidelines on Antiharassment Training*

While not expressly mandated by federal statute or regulation, training on equal employment opportunity topics—*i.e.*, discrimination, harassment, and retaliation—has become *de facto* mandatory for employers.[462] Multiple decisions of the U.S. Supreme Court[463] and subsequent lower court decisions have made clear that an employer that does not conduct effective training: (1) will be unable to assert the affirmative defense that it exercised reasonable care to prevent and correct harassment; and (2) will subject itself to the risk of punitive damages. EEOC guidance on employer liability reinforces the important role that training plays in establishing a legal defense to harassment and discrimination claims.[464] Training for all employees, not just managerial and supervisory employees, also demonstrates an employer's "good faith efforts" to prevent harassment. For more information on harassment claims and employee training, see LITTLER ON HARASSMENT IN THE WORKPLACE and LITTLER ON EMPLOYEE TRAINING.

3.11(d)(ii) *State Guidelines on Antiharassment Training*

There are no antiharassment training and education requirements mandated for private employers in Virginia.

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[460] VA. CODE ANN. § 2.2-3904.

[461] VA. CODE ANN. § 2.2-3904.

[462] Note that the Notification and Federal Employee Anti-Discrimination and Retaliation ("No FEAR") Act mandates training of federal agency employees.

[463] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); see also *Kolstad v. American Dental Assoc.*, 527 U.S. 526 (1999).

[464] EEOC, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, June 18, 1999, available at http://www.eeoc.gov/policy/docs/harassment.html; see also EEOC, Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic (June 2016), available at https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

3.12 Miscellaneous Provisions

3.12(a) *Whistleblower Claims*

3.12(a)(i) *Federal Guidelines on Whistleblowing*

Protections for whistleblowers can be found in dozens of federal statutes. The federal Occupational Safety and Health Administration ("Fed-OSHA") administers over 20 whistleblower laws, many of which have little or nothing to do with safety or health. Although the framework for many of the Fed-OSHA-administered statutes is similar (*e.g.*, several of them follow the regulations promulgated under the Wendell H. Ford Aviation Investment and Reform Act (AIR21)), each statute has its own idiosyncrasies, including who is covered, timeliness of the complaint, standard of proof regarding nexus of protected activity, appeal or objection rights, and remedies available. For more information on whistleblowing protections, see LITTLER ON WHISTLEBLOWING & RETALIATION.

3.12(a)(ii) *State Guidelines on Whistleblowing*

Virginia law prohibits an employer from discharging, disciplining, threatening, discriminating against, penalizing, or taking any other retaliatory action regarding an employee's compensation or terms, conditions, location, or privileges of employment, because the employee:

- reports a violation of any federal or state law or regulation to a supervisor or to any governmental body or law enforcement official;
- is requested by a governmental body or law enforcement official to participate in an investigation, hearing, or inquiry;
- refuses to engage in a criminal act that would subject the employee to criminal liability;
- refuses an employer's order to perform an action that violates any federal or state law or regulation and the employee informs the employer that the order is being refused for that reason; or
- provides information to or testifies before any governmental body or law enforcement official conducting an investigation, hearing, or inquiry into any alleged violation by the employer of federal or state law or regulation.

The law does not:

- authorize an employee to make a disclosure of data otherwise protected by law or any legal privilege;
- permit an employee to make statements or disclosures knowing that they are false or that they are in reckless disregard of the truth; or
- permit disclosures that would violate federal or state law or diminish or impair the rights of any person to the continued protection of confidentiality of communications provided by the common law.

If an employer violates the law, an employee may bring a civil action within one year of the alleged retaliatory action. Available remedies include: (1) an injunction to prevent continued retaliation; (2) reinstatement of the employee to the same position held before the retaliatory action or to an equivalent

position; and (3) compensation for lost wages, benefits, and other remuneration, with interest, as well as reasonable attorney fees and costs.[465]

3.12(b) *Labor Laws*

3.12(b)(i) *Federal Labor Laws*

Labor law refers to the body of law governing employer relations with unions. The National Labor Relations Act (NLRA)[466] and the Railway Labor Act (RLA)[467] are the two main federal laws governing employer relations with unions in the private sector. The NLRA regulates labor relations for virtually all private-sector employers and employees, other than rail and air carriers and certain enterprises owned or controlled by such carriers, which are covered by the RLA. The NLRA's main purpose is to: (1) protect employees' right to engage in or refrain from *concerted activity* (*i.e.*, group activities attempting to improve working conditions) through representation by labor unions; and (2) regulate the collective bargaining process by which employers and unions negotiate the terms and conditions of union members' employment. The National Labor Relations Board (NLRB or "Board") enforces the NLRA and is responsible for conducting union elections and enforcing the NLRA's prohibitions against "unfair" conduct by employers and unions (referred to as *unfair labor practices*). For more information on union organizing and collective bargaining rights under the NLRA, see LITTLER ON UNION ORGANIZING and LITTLER ON COLLECTIVE BARGAINING.

Labor policy in the United States is determined, to a large degree, at the federal level because the NLRA preempts many state laws. Yet, significant state-level initiatives remain. For example, *right-to-work laws* are state laws that grant workers the freedom to join or refrain from joining labor unions and prohibit mandatory union dues and fees as a condition of employment.

3.12(b)(ii) *Notable State Labor Laws*

Right-to-Work Law. Virginia is a right-to-work state. Virginia law prohibits employers from requiring that employees become or remain members of a union or from requiring employees to abstain from membership in, or holding office in, a union as a condition of employment.[468] An employee who is denied employment or is terminated in violation of this statute may bring a claim against the employer for damages sustained as a result of the employer's actions.[469]

In addition, in 2013, Virginia enacted two laws intended to enhance employee privacy protections, particularly during union organizing drives in the Commonwealth.

Secret Ballot Protection Act. The Secret Ballot Protection Act guarantees voter privacy in union elections. It states that "in any procedure providing for the designation, selection or authorization of a labor organization to represent employees, the right of an individual employee to vote by secret ballot is a fundamental right that shall be guaranteed from infringement."[470] This law is viewed as a response to federal legislation, proposed in the past, to allow unions to organize a workforce by simply obtaining

[465] VA. CODE ANN. § 40.1-27.3.

[466] 29 U.S.C. §§ 151 to 169.

[467] 45 U.S.C. §§ 151 *et seq*.

[468] VA. CODE ANN. §§ 40.1-60, 40.1-61.

[469] VA. CODE ANN. § 40.1-63.

[470] VA. CODE ANN. § 40.1-54.3.

signatures from a majority of employees on authorization cards—a procedure known as "card check"—instead of holding secret ballot elections.

Keeping Employees' Emails and Phones Secure (KEEP) Act. The KEEP Act provides that employers cannot be:

> required to release, communicate, or distribute to third parties personal identifying information (defined as home and mobile telephone numbers, email addresses, shift times and work schedules) about current or former employees, unless required by federal or state law, ordered by a court of competent jurisdiction, required pursuant to a warrant, or required by a subpoena or discovery in a civil case.[471]

4. END OF EMPLOYMENT

4.1 Plant Closings & Mass Layoffs

4.1(a) *Federal WARN Act*

The federal Worker Adjustment and Retraining Notification (WARN) Act requires a covered employer to give 60 days' notice prior to: (1) a *plant closing* involving the termination of 50 or more employees at a single site of employment due to the closure of the site or one or more operating units within the site; or (2) a *mass layoff* involving either 50 or more employees, provided those affected constitute 33% of those working at the single site of employment, or at least 500 employees (regardless of the percentage of the workforce they constitute).[472] The notice must be provided to affected nonunion employees, the representatives of affected unionized employees, the state's dislocated worker unit, and the local government where the closing or layoff is to occur.[473] There are exceptions that either reduce or eliminate notice requirements. For more information on the WARN Act, see LITTLER ON REDUCTIONS IN FORCE.

4.1(b) *State Mini-WARN Act*

Virginia does not have a mini-WARN law requiring advance notice to employees of a plant closing.

4.1(c) *State Mass Layoff Notification Requirements*

Employers and employing units subject to Virginia's unemployment compensation law must notify the Virginia Employment Commission of any mass separation.[474] *Mass separation* is defined as:

- separation (permanently, for an expected duration of at least seven days, or for any indefinite period) at or about the same time and for the same reasons;
  - of at least 20% of the total number of workers employed in an establishment;
  - of at least 50% of the total number of workers employed in any division or department of any establishment; or

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[471] VA. CODE ANN. § 40.1-28.7:4.

[472] 29 U.S.C. § 2101(1)-(3). Business enterprises employing: (1) 100 or more full-time employees; or (2) 100 or more employees, including part-time employees, who in aggregate work at least 4,000 hours per week (exclusive of overtime) are covered by the WARN Act. 20 C.F.R. § 639.3.

[473] 20 C.F.R. §§ 639.4, 639.6.

[474] 16 VA. ADMIN. CODE § 5-60-10(C).

- notwithstanding any of the foregoing, a separation at or about the same time and for the same reason of 25 or more workers employed in a single establishment.[475]

If an employer submits a list of affected workers to the commission, it need not report each worker individually. Notice must include the workers' Social Security numbers and any other information requested by the commission. Employers must notify the commission "as soon as possible, but in no case later than 24 hours after the date of separation."[476] Willful violation of the notice requirement constitutes a Class 1 misdemeanor, and each day the violation continues constitutes a separate offense.

Additional, separate notice to affected employees is not required. Nonetheless, it is recommended that an employer provide a copy of the unemployment insurance information notice (VEC-B-29) when employment ends.[477]

4.2 Documentation to Provide When Employment Ends

4.2(a) *Federal Guidelines on Documentation at End of Employment*

Table 10 lists the documents that must be provided when employment ends under federal law.

Table 10. Federal Documents to Provide at End of Employment

Category	Notes
Health Benefits: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Under COBRA, the administrator of a covered group health plan must provide written notice to each covered employee and spouse of the covered employee (if any) of the right to continuation coverage provided under the plan.[478] The notice must be provided not later than the earlier of: • the date that is 90 days after the date on which the individual's coverage under the plan commences or, if later, the date that is 90 days after the date on which the plan first becomes subject to the continuation coverage requirements; or • the first date on which the administrator is required to furnish the covered employee, spouse, or dependent child of such employee notice of a qualified beneficiary's right to elect continuation coverage.

[475] 16 VA. ADMIN. CODE § 5-10-10.

[476] 16 VA. ADMIN. CODE § 5-60-10(C).

[477] VA. CODE ANN. § 60.2-106; 16 VA. ADMIN. CODE § 30-50-80. This poster is available at https://www.vec.virginia.gov/employers/Required-Posters-for-Virginia-Employers. It is available in English at http://www.vec.virginia.gov/pdf/vecb29eng.pdf and in Spanish at http://www.vec.virginia.gov/pdf/vecb29sp.pdf.

[478] 29 C.F.R. § 2590.606-1. Model notices and general information about COBRA is available from the U.S. Department of Labor's Employee Benefits Security Administration at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

Table 10. Federal Documents to Provide at End of Employment	
Retirement Benefits	The Internal Revenue Service requires the administrator of a retirement plan to provide notice to terminating employees within certain time frames that describe their retirement benefits and the procedures necessary to obtain them.[479]

4.2(b) *State Guidelines on Documentation at End of Employment*

Table 11 lists the documents that must be provided when employment ends under state law.

Table 11. State Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: Mini-COBRA, etc.	Under Virginia law, employers not covered by COBRA nonetheless must provide for continuation coverage for group health benefits in the event that covered individual(s) lose their eligibility for coverage (*i.e.*, upon termination). The employer must provide each employee, or other person covered under the employer's policy, written notice of the availability of continuation coverage as well as the procedures and timeframes for obtaining continuation or conversion of the group policy. This notice must be provided within 14 days of the policyholder's knowledge of the employee's or other covered individual's loss of eligibility under the policy.[480]
Unemployment Notice	**Generally.** Each employer must post and maintain in places readily accessible to individuals in its services all such posters related to unemployment insurance as furnished it by the Commission. The Commission provides the "Notice to Workers" (VEC-B-29), which provides employees with information on when they are eligible for unemployment insurance benefits and how to apply for those benefits. Employers must also provide a copy of the notice to an employee at the time of separation from employment in addition to the workplace posting requirement. The notice must be provided in person or electronically to the individual at the time of separation or mailed to the individual's last known address.[481] . **Multistate Workers.** Whenever an individual covered by an election is separated from employment, an employer must again notify the employee as to the jurisdiction under whose unemployment

[479] See the section "Notice given to participants when they leave a company" at https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-notices.

[480] VA. CODE ANN. § 38.2-3541.

[481] VA. CODE ANN. § 60.2-106; 16 VA. ADMIN. CODE § 30-50-80; 16 VA. ADMIN. CODE § 5-32-20. This poster is available at https://www.vec.virginia.gov/employers/Required-Posters-for-Virginia-Employers. It is available in English at http://www.vec.virginia.gov/pdf/vecb29eng.pdf and in Spanish at http://www.vec.virginia.gov/pdf/vecb29sp.pdf.

Table 11. State Documents to Provide at End of Employment	
Category	**Notes**
	compensation law the employee's services have been covered. If at the time of termination the individual is not located in the elected jurisdiction, an employer must notify the employee as to the procedure for filing interstate benefit claims. In addition to the above notice requirement, employers must comply with the covered jurisdiction's general notice requirement, if applicable.[482]

4.3 Providing References for Former Employees

4.3(a) *Federal Guidelines on References*

Federal law does not specifically address providing former employees with references.

4.3(b) *State Guidelines on References*

Virginia law prohibits employers from blacklisting employees who have voluntarily or involuntarily left their employment. In other words, employers may not purposely give false letters of reference, make malicious, negative comments, or otherwise engage in actions to prevent an individual from obtaining employment. It is a misdemeanor for a former employer to "willfully and maliciously prevent or attempt to prevent by word or writing, directly or indirectly [a former employee] . . . from obtaining employment with any other person."[483] However, the statute does not prohibit an employer from giving either a truthful statement of the reason for such discharge or a truthful statement concerning the character, industry, and ability of such person who has voluntarily left. If an employer engages in the conduct prohibited under this statute, it may also be named as a defendant in a defamation lawsuit or a lawsuit alleging that it unlawfully interfered in the prospective contractual relationship between an individual and their desired employer.[484]

Limited immunity for communicating job-related information about an employee to a prospective or current employer is available. The law provides:

> Any employer who, upon request by a person's prospective or current employer, furnishes information about that person's professional conduct, reasons for separation or job performance, including . . . information contained in any written performance evaluations, shall be immune from civil liability . . . provided that the employer is not acting in bad faith . . . or with reckless disregard for whether [the information] is false.[485]

The immunity applies when a prospective or current employer requests information about an individual. The immunity does not apply to statements volunteered to others or to information communicated to someone other than a prospective or current employer. Facts, data, and opinions are all covered by this

[482] 16 VA. ADMIN. CODE § 5-50-10.

[483] VA. CODE ANN. § 40.1-27.

[484] VA. CODE ANN. § 40.1-27.

[485] VA. CODE ANN. § 8.01-46.1(A).

immunity.[486] The law provides some measure of protection to an employer that communicates information about a person's professional conduct, reasons for separation, job performance, attendance history, disciplinary actions, and productivity, as well as information contained in written performance evaluations.[487] All such communications should be job-related and narrowly tailored to avoid claims of bad faith. Employers are presumed to have acted in good faith when responding to a prospective or current employer.[488] Therefore, a plaintiff must prove by clear and convincing evidence that an employer acted in bad faith to overcome the presumption.

[486] VA. CODE ANN. § 8.01-46.1(C).

[487] *Sarno v. Clanton*, 59 Va. Cir. 384 (Va. Cir. Ct. 2002) (finding an employer was protected by the qualified privilege when it discussed the character of its employee with its employee's potential employers so long as the employer made the disclosures in good faith and without malice).

[488] VA. CODE ANN. § 8.01-46.1(A).